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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

LA SALLE NATIONAL BANK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WADE H. MCCREE, JR.,
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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	17
Appendix A	1a
Appendix B	4a
Appendix C	21a
Appendix D	23a

CITATIONS

Cases:

Beckwith v. *United States*, 425 U.S. 341	13
Couch v. *United States*, 409 U.S. 322	12
Donaldson v. *United States*, 400 U.S. 517	5, 6, 10, 11, 12, 13, 14, 15, 16
Reisman v. *Caplin*, 375 U.S. 440	14
United States v. *Billingsley*, 469 F.2d 1208	9, 13
United States v. *Friedman*, 532 F.2d 928	8
United States v. *Hodge and Zweig*, 548 F.2d 1351	8
United States v. *Lafko*, 520 F.2d 622	8
United States v. *McCarthy*, 514 F.2d 368	8, 10
United States v. *Powell*, 379 U.S. 48	14
United States v. *Troupe*, 438 F.2d 117	7

Cases—Continued — Page

United States v. *Wall Corp.*, 475 F.2d 893 — 8
United States v. *Weingarden*, 473 F.2d 454 — 7, 9
United States v. *Zack*, 521 F.2d 1366 — 8

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):

Section 7402(b) — 3
Section 7601 — 2, 23a
Section 7602 — 2, 3, 12, 14, 23a
Section 7604(a) — 3
Section 7608 — 2, 24a
Section 7609 — 2
Section 7801 — 2, 25a
Section 7801(a) — 10

Miscellaneous:

1976 Annual Report of the Commissioner of Internal Revenue — 13
Internal Revenue Service Organization and Functions:

§ 1113.563, 39 Fed. Reg. 11572, 11581 — 11
§ 1114.8, 39 Fed. Reg. 11601 — 11
§ 1118.6, 39 Fed. Reg. 11607 — 11

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v.

LA SALLE NATIONAL BANK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America and John F. Olivero, a special agent of the Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion and order of the district court (App. A, *infra*, pp. 1a-3a) are not officially reported. The opinion of the court of appeals (App. B, *infra*, pp. 4a-20a) is reported at 554 F.2d 302.

JURISDICTION

The judgment of the court of appeals (Appp. C, *infra*, pp. 21a-22a) was entered on April 11, 1977. On July 1, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an internal revenue summons may properly be issued to obtain third-party records in aid of an administrative investigation conducted by the Internal Revenue Service to determine whether it should recommend to the Department of Justice that a taxpayer be prosecuted for criminal tax violations.

STATUTES INVOLVED

The pertinent provisions of Sections 7601, 7602, 7608, 7609, and 7801 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in Appendix D, *infra*, pp. 23a-25a.

STATEMENT

1. Special Agent John F. Olivero of the Intelligence Division of the Internal Revenue Service issued two summonses to respondents to compel testimony and the production of books and records in connection with his investigation of the federal income tax liabilities of John Gattuso for the years 1970-1972

(App. B, *infra*, pp. 5a-6a; Tr. 6).[1] These summonses were issued pursuant to 26 U.S.C. 7602, which authorizes the Internal Revenue Service to examine any books, papers, records, and to require testimony "[f]or the purpose of ascertaining the correctness of any return, * * * [or] determining the liability of any person for any internal revenue tax * * *" (see App. D, *infra*, pp. 23a-24a). Special Agent Olivero determined that he needed respondents' testimony and records in order to confirm the accuracy of items of rental income from real property reported on Gattuso's tax returns because the property in question was held in trust by respondent La Salle National Bank (Tr. 7). Respondent Lang, a vice-president of La Salle National Bank, appeared before Special Agent Olivero in response to the summonses but refused to testify or to produce the records (App. B, *infra*, p. 5a).

Pursuant to 26 U.S.C. 7402(b) and 7604(a), the government and Special Agent Olivero then commenced this action in the United States District Court for the Northern District of Illinois to enforce the summonses (App. B, *infra*, pp. 5a-6a). At a hearing, Special Agent Olivero testified that the purpose of his investigation was "[t]o determine tax liabilities for the years under investigation" (Tr. 6) (see also Tr. 37). Olivero further stated the focus of his inquiry was "[t]o investigate the possibility of criminal violations of the Internal Revenue Code"

[1] "Tr." refers to the trial transcript. For the convenience of the Court, we are lodging a copy of the transcript with the Clerk.

(*ibid.*). Finally, Olivero testified that neither he nor the Internal Revenue Service had made a recommendation that Gattuso be prosecuted for criminal tax violations (Tr. 11-12; App. B, *infra*, p. 6a).

At the conclusion of the hearing, the district court stated that it had "heard nothing in Agent Olivero's testimony to suggest that the thought of a civil investigation ever crossed his mind" (Tr. 61; App. B, *infra*, p. 7a). The court then indicated that it would inspect Olivero's files *in camera* to determine whether there were any civil aspects of the investigation (App. B, *infra*, pp. 7a-8a).

After such inspection, the district court denied enforcement of the summonses (App. A, *infra*, pp. 1a-3a). The court stated that "[i]t is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso" (App. A, *infra*, p. 3a). While the court recognized that Olivero had not recommended that Gattuso be prosecuted for criminal tax violations, it concluded that the "focus and determination" (*ibid.*) of his investigation was criminal. In the district court's view, "[a]n Internal Revenue summons under such circumstances is not issued in good faith" (*ibid.*).

2. The court of appeals affirmed (App. B, *infra*, pp. 4a-20a). It held that "there is ample support in the record for the district court's finding of sole criminal purpose" (App. B, *infra*, p. 11a). While the

court of appeals acknowledged that Olivero testified that his investigation had a civil purpose, it concluded that the district court discredited that testimony (*ibid.*).

In considering whether the district court applied the proper legal test, the court of appeals recognized that this Court's decision in *Donaldson* v. *United States*, 400 U.S. 517, established the governing standard for the enforcement of an internal revenue summons. There, the Court stated (400 U.S. at 536): "We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."

After reviewing the post-*Donaldson* decisions in the courts of appeals, the court below observed that "[t]he reported cases establish that the various circuits, including our own, have formulated several distinct standards for quashing a summons issued under 26 U.S.C. § 7602" (App. B, *infra*, p. 11a). The court further noted "that the *Donaldson* opinion has engendered some confusion" (App. B, *infra*, p. 16a). Having accepted the district court's finding that Olivero's issuance of the summonses was solely in aid of a criminal investigation, the court of appeals held that such summonses are unenforceable under the *Donaldson* standard. The court stated: "Our reading of the reported cases persuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith" (App. B, *infra*, p. 19a).

REASONS FOR GRANTING THE PETITION

1. *a.* In *Donaldson* v. *United States*, 400 U.S. 517, 536, this Court held that "under § 7602 [of the Internal Revenue Code] an internal revenue summons may be issued in good faith and prior to a recommendation for criminal prosecution." The Court stated that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct" (*id.* at 535). However, "where a criminal prosecution has been instituted and is pending at the time of the issuance of the summons," the Court indicated that the purpose of the summons is not a legitimate one and enforcement may be denied because "the sole objective of the investigation is to obtain evidence for use in a criminal prosecution" (*id.* at 533).

Despite the Court's unequivocal ruling in *Donaldson* that an internal revenue summons "may be issued in good faith and prior to a recommendation for criminal prosecution," the court of appeals held that a special agent may not issue a summons for third-party records in aid of a criminal investigation even though there has been no recommendation for prosecution. The distinction *Donaldson* drew, however, was not between civil and criminal investigations but between a summons issued before the Internal Revenue Service forwards its recommendation for criminal prosecution to the Department of Justice and a summons issued after such a recommendation. It is only in the latter situation that the

summons is unenforceable. Indeed, *Donaldson* itself involved basically the same situation as the present case: the issuance of summonses seeking the production of records of third persons, not of the taxpayer, by a Special Agent of the Internal Revenue Service who, like agent Olivero in this case, was conducting an investigation to determine whether criminal prosecution should be recommended.

The decision below therefore conflicts with *United States* v. *Troupe*, 438 F.2d 117 (C.A. 8), where the court stated: "The *Donaldson* case makes it clear that the summons can be successfully challenged only when a criminal prosecution has been instituted and is pending at the time of the issuance of the summons or when criminal prosecution has been recommended. Thus, it is only when the *sole* purpose of the summons is for a criminal investigation that a challenge to the summons can be made" (438 F.2d at 119; emphasis in original).

b. Moreover, the courts of appeals are in disagreement over when *Donaldson* prohibits use of an Internal Revenue summons in connection with a possible criminal case. As the court of appeals here acknowledged, "The reported cases establish that the various circuits, including our own, have formulated several distinct standards for quashing a summons issued under 26 U.S.C. § 7602" (App. B, *infra*, p. 11a). Thus, for example, in *United States* v. *Weingarden*, 473 F.2d 454 (C.A. 6), the court rejected the government's claim that a summons was enforceable even though it was issued prior to a recommendation for

prosecution. Like the decision below, the Sixth Circuit there held that "The standard is whether the sole purpose of the issuance of the summons is for criminal prosecution" (473 F.2d at 460; footnote omitted), although it acknowledged (*id.* at 460 n.11) that the Eighth Circuit's decision in *Troupe* was to the contrary.

Subsequently, in *United States* v. *Wall Corp.*, 475 F.2d 893 (C.A. D.C.), the court carried the "sole criminal purpose" test one step further beyond the *Donaldson* standard. Premising the enforceability of a summons upon the subjective motivation of the agent, the court held that "if it can be shown that the investigating agent had already formed a firm purpose to recommend criminal prosecution even though he had not as yet made a formal recommendation, issuance of the summons would presumably be in bad faith" (475 F.2d at 895). Accord: *United States* v. *McCarthy*, 514 F.2d 368, 374-375 (C.A. 3);[2] *United States* v. *Lafko*, 520 F.2d 622, 624-625 (C.A. 3); *United States* v. *Friedman*, 532 F.2d 928, 932-933 (C.A. 3); *United States* v. *Zack*, 521 F.2d 1366, 1368 (C.A. 9).

However, in *United States* v. *Hodge and Zweig*, 548 F.2d 1347, 1351, the Ninth Circuit apparently retreated from the "firm purpose" test. There, it

[2] While approving the "firm purpose" test of *Wall Corp.*, the Third Circuit in *McCarthy* declined to follow the Sixth Circuit's holding in *Weingarden* that *Donaldson* can be read to support the "solely for criminal purposes" test and not the "recommendation for prosecution" test. See 514 F.2d at 374 n. 7. See also App. B, *infra*, p. 13a n. 3.

upheld the enforcement of a summons despite the fact that both the special agent and the District Director recommended prosecution of the taxpayer under investigation. However, when their recommendations were forwarded to the Regional Counsel of the Internal Revenue Service, he requested a continuance of the investigation. The summons was issued thereafter, but before the Service formally recommended prosecution to the Department of Justice. In ordering the summons enforced, the court stated: "In our view, the formal recommendation from the Internal Revenue Service to the Justice Department is the operative recommendation under *Donaldson*" (548 F.2d at 1351; footnote omitted). Accord: *United States* v. *Billingsley*, 469 F.2d 1208, 1210 (C.A. 10).

In short, much of the confusion in the lower courts that the Court sought to eliminate in *Donaldson* concerning the proper standard governing the enforcement of an internal revenue summons (see 400 U.S. at 532-533) has reappeared once again in the post-*Donaldson* decisions. As the court below declared, "[a] review of the cases from other circuits establishes to our satisfaction that the *Donaldson* opinion has engendered some confusion" (App. B, *infra*, p. 16a).[3] This Court should resolve the disarray among

[3] The courts of appeals have also differed as to the proper weight to be given to the Court's statement in *Donaldson*—"We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recomendation for criminal prosecution" (400 U.S. at 536). Thus, in *United States* v. *Weingarden, supra*, 473 F.2d at 460, the Sixth Circuit characterized this language

the circuits and restore a uniform national rule with respect to this major question affecting the conduct of federal tax investigations.

2. The fundamental error of the court of appeals was its assumption that a special agent's investigatory activities are "solely for criminal purposes" so that his issuance of a summons to obtain evidence of criminal tax violations is "a quintessential example of bad faith" (App. B, *infra*, p. 19a).

The functions of the Internal Revenue Service cannot be so compartmentalized between civil and criminal purposes. The Internal Revenue Service is organized to discharge the broad responsibilities of the Secretary of the Treasury to administer and enforce the internal revenue laws (26 U.S.C. 7801(a), App. D, *infra*, p. 25a). As the Court recognized in *Donaldson* v. *United States*, *supra*, 400 U.S. at 534, each district office of the Internal Revenue Service has an audit division and an intelligence division to carry out the district director's responsibility for determining and assessing tax liability and investigating criminal and civil violations of the tax laws. While the

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as "only dictum" because the precise issue was whether the taxpayer could intervene in the summons enforcement proceeding and the Court held against intervention. But while the Third Circuit in *United States* v. *McCarthy*, *supra*, 514 F.2d at 374, agreed that the Court's statement was technically dictum insofar as the Court was not required to reach the issue, it noted "that a holding of the Supreme Court, even in dictum, should not lightly be dismissed" (*id.* at 374 n. 7). The court below concluded that the pertinent language of *Donaldson* was "an intentional formulation of an alternative holding" (App. B, *infra*, p. 17a n. 4).

Audit Division's program emphasizes the civil aspects of enforcement, it includes "participation with special agents [of the Intelligence Division] in the conduct of fraud investigations." Internal Revenue Service Organization and Functions, § 1113.563, 39 Fed. Reg. 11572, 11581. The Intelligence Division (§ 1118.6) "enforces the criminal statutes applicable to income * * * [and other] tax laws * * * by developing information concerning alleged criminal violations thereof * * *." 39 Fed. Reg. 11607.

Finally, the Assistant Regional Commissioner in charge of the Intelligence Division provides further coordination between the Intelligence and Audit Divisions by developing (§ 1114.8) "regional programs, standards and other measures necessary to implement most effectively the intelligence program of the Service *which includes the investigation of alleged tax fraud, certain other civil and alleged criminal violations of tax laws * * *, and such other special investigations as the Commissioner may direct*" (39 Fed. Reg. 11601; emphasis supplied).

These joint responsibilities of the Internal Revenue Service confirm the correctness of the Court's observation in *Donaldson* that the combined efforts of the audit and intelligence divisions "are directed to both civil and criminal infractions; and that any decision to recommend prosecution comes only after the investigation is complete or is sufficiently far along to support appropriate conclusions" (400 U.S. at 535). It was therefore unrealistic for the court of appeals to characterize the special agent's investigation in

this case as "solely for criminal purposes" (App. B, *infra*, p. 19a).

Apart from the fact that the agent testified that the purpose of his inquiry was "[t]o determine the tax liabilities for the years under investigation" (Tr. 6) and that he needed the summoned materials to determine the accuracy of reported items of rental income (Tr. 7), "[t]here is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance." *Donaldson* v. *United States*, *supra*, 400 U.S. at 535. See also *Couch* v. *United States*, 409 U.S. 322, 326. If evidence warranting a criminal prosecution is uncovered, the same evidence is also likely to result in a deficiency assessment and a civil fraud penalty (see p. 13, n. 4, *infra*).

To perform the investigative functions, Section 7602 authorizes the Secretary or his delegate "[t]o summon * * * any person having possession of * * * books of account containing entries relating to the business of the person liable for tax" or "[t]o take such testimony of the person * * *" "[f]or the purpose of ascertaining the correctness of any return * * *." The statute broadly encompasses every type of investigation, whether its direction is civil or criminal. "There is nothing in the language of § 7602 to limit the issuance of summonses to civil investigations" (*Donaldson* v. *United States*, *supra*, 400 U.S. at 537 (Douglas, *J.*, concurring)).

To be sure, the focus of a special agent's work is

on possible criminal violations, so that he is only assigned to a case "as a result of some allegation or indication of criminal conduct" (*Donaldson* v. *United States*, *supra*, 400 U.S. at 537 n. 1 (Douglas, *J.*, concurring)). See also *Beckwith* v. *United States*, 425 U.S. 341, 345. But until the Internal Revenue Service refers a case to the Department of Justice with a recommendation for prosecution, "the civil aspects [of the investigation] are inextricably associated with the criminal" (*United States* v. *Billingsley*, *supra*, 469 F.2d at 1210). Thus, the presence of a special agent does not necessarily mean that prosecution will ensue.[4]

3. Although the court of appeals acknowledged that the final paragraph of this Court's *Donaldson* opinion established the recommendation for prosecution by the Internal Revenue Service as the line of demarcation between a civil and a criminal case, it nevertheless concluded that a summons issued prior to such a recommendation would not meet the "good faith" requirement of *Donaldson* if it were "solely for criminal purposes" (see App. B, *infra*, p. 19a). The court relied upon the earlier discussion in *Donald-*

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[4] In 1976, the Intelligence Division commenced 8,797 full-scale tax fraud investigations. Only 2,037, or approximately one-quarter, of these resulted in recomendations for prosecution. The 6,760 cases not recommended to the Department of Justice involved approximately $11 million in deficiencies and penalties. See 1976 Annual Report of the Commissioner of Internal Revenue, pp. 33, 61, 152. The 1969 statistics considered by the Court in *Donaldson* are comparable (see 400 U.S. at 535 n. 17).

son with respect to the dictum in *Reisman* v. *Caplin*, 375 U.S. 440, 449, that—

> the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought * * * for use in a criminal prosecution, *Boren* v. *Tucker*, 239 F.2d 767, 772-773, * * *.

In explaining this dictum, the Court in *Donaldson* stated that "The *Reisman* dictum * * * comes into proper focus as applicable to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes" (400 U.S. at 533). Emphasizing the final phrase of this sentence, the court of appeals held that a summons issued "solely for criminal purposes" would not meet the "good faith" standard of *Donaldson*.

But, as we have shown, *Donaldson* holds that there is no meaningful line that can be drawn between the "civil" and "criminal" purposes of a special agent's investigation prior to the Internal Revenue Service's recommendation for prosecution (400 U.S. at 535). Hence, we submit that if a summons is issued for one of the purposes enumerated in Section 7602 relating to the functions of the Internal Revenue Service and not for ulterior purposes or harassment, it will meet the "good faith" standard of *Donaldson*. See *United States* v. *Powell*, 379 U.S. 48, 57-58.

Moreover, the Court's discussion in *Donaldson* (400 U.S. at 533) of its *Reisman* dictum demonstrates that the phrase employed in *Donaldson*—"an investigation solely for criminal purposes" (*ibid.*)—referred to the

agent's inquiry after the Service's recommendation for prosecution.

After noting that a summons is improper if it is issued after a criminal prosecution has been instituted, the Court stated (400 U.S. at 533) that it was "precisely * * * [that] situation—where the sole object of the investigation is to gather data for criminal prosecution—that is the subject of the *Reisman* dictum." As the Court further observed, "This is evident from the fact that the dictum itself embraces the citation of *Boren* v. *Tucker*, 239 F.2d 767, 772-773 (CA 9 1956), an opinion in which, at the pages cited, the Ninth Circuit very carefully distinguished *United States* v. *O'Connor*, 118 F. Supp. 248 (Mass. 1953), a case where the taxpayer already was under indictment" (400 U.S. at 533).

Since the Court had earlier cited with approval those cases that expressly sanctioned the use of a summons issued to investigate criminal conduct when no criminal prosecution had been instituted (see 400 U.S. at 532-533 n. 14), the phrase "an investigation solely for criminal purposes" refers to a case where the Internal Revenue Service has already recommended prosecution. The court of appeals' conclusion that the pre-recommendation investigation of a special agent is "solely for criminal purposes" under *Donaldson* is therefore erroneous.

4. The court of appeals' ruling that an agent's subjective motive can be taken into account in determining whether a summons is issued in "good faith" threatens to impair the enforcement of the

internal revenue laws. In any investigation conducted by a special agent of the Internal Revenue Service, the focus of the inquiry is to ascertain whether there is any evidence of criminal conduct, but that inquiry also necessarily involves questions of civil tax liability. If the courts continue to depart from the line of demarcation established in *Donaldson* and engage in a search for the agent's "sole purpose" or "firm purpose," the enforceability of summonses will continue to be subject to litigation-producing uncertainties, and summons enforcement proceedings will become enmired in a host of factual details and subjective inquiries that are irrelevant to the purposes of the summons power set forth in Section 7602. The potential for delay of criminal investigations beyond the expiration of the statute of limitations would require the Internal Revenue Service "in a situation of suspected but undetermined fraud, to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution," and thereby "stultify enforcement of federal law" (*Donaldson* v. *United States*, *supra*, 400 U.S. at 536).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1977.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

THE UNITED STATES OF AMERICA AND JOHN F. OLIVERO, Special Agent, Internal Revenue Service, PETITIONERS

v.

LA SALLE NATIONAL BANK, JOSEPH W. LANG, Vice President of La Salle National Bank, RESPONDENTS

MEMORANDUM OPINION AND ORDER

The United States of America and John F. Olivero, Special Agent, Internal Revenue Service, as petitioners, have asked the Court to judicially enforce two Internal Revenue summonses served upon the respondent, La Salle National Bank.

At a hearing on the petition, the evidence established that, at the time of the issuance of the summonses, Special Agent John F. Olivero was assigned to the investigation of possible tax liabilities of one John Gattuso, that his investigation had not been completed, and that he had made neither a preliminary investigative report nor a recommendation for criminal prosecution. Agent Olivero testified that he had not yet determined whether to recommend criminal prosecution in the case.

Respondents contend that Special Agent Olivero was in fact conducting an investigation of criminal

violations of the Internal Revenue Code by John Gattuso and that, under these circumstances, utilization of an Internal Revenue summons to obtain evidence was an abuse of this summons. The evidence further revealed that Special Agent Olivero was the only agent assigned to this investigation and that no revenue agent was working in conjunction with him.

The Court recognizes that civil and criminal investigations may go forward side by side before a determination of the ultimate focus of the investigation is made. The Court recognizes further that the presence of a special agent assigned to the investigation does not automatically make it a criminal investigation.

It is an improper use of an Internal Revenue summons to serve it solely for the purpose of obtaining evidence for use in a criminal prosecution. *Reisman* v. *Caplin*, 375 U.S. 440 (1964). On the other hand, it is not an improper use of an Internal Revenue summons to issue it in aid of an investigation, if the issuance is prior to a recommendation for criminal prosecution and in good faith. *Donaldson* v. *United States*, 400 U.S. 517 (1971).

The recommendation for criminal prosecution is certainly the event which definitely determines the focus of the Internal Revenue Service upon criminal prosecution as the end and goal of its investigation. It is apparent, however, that this focus and determination may be arrived at, under certain circumstances, before the actual recommendation for criminal prosecution has been made. In the event such focus and determination has been arrived at at the time of the issuance of the Internal Revenue summons, the fact that it precedes the formal recommendation for criminal prosecution is not relevant. An Internal Revenue summons under such circumstances is not issued in good faith.

The Supreme Court in the *Donaldson* case, *supra*, leaves no doubt that it regards as inappropriate the issuance of an Internal Revenue summons in an ". . . investigation solely for criminal purposes." *Donaldson* v. *United States*, 400 U.S. 517, at 533.

It is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso.

Therefore the petition of The United States of America and John F. Olivero, Special Agent of the Internal Revenue Service, for the enforcement of Internal Revenue summonses served upon the respondent, La Salle National Bank, is denied.

ENTER:

/s/ Frank J. McGarr
FRANK J. MCGARR
United States District Judge

DATED: March 9, 1976

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1572

UNITED STATES OF AMERICA and JOHN F. OLIVERO,
Special Agent of the Internal Revenue Service,
PETITIONERS-APPELLANTS

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG,
Vice-President of the LaSalle National Bank,
RESPONDENTS-APPELLEES

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 75-C-3842—FRANK J. MCGARR, *Judge*

ARGUED JANUARY 6, 1977—DECIDED APRIL 11, 1977

Before PELL and SPRECHER, *Circuit Judges*, and EAST, *Senior District Judge.**

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* Senior District Judge William G. East of the United States District Court for the District of Oregon is sitting by designation.

PELL, *Circuit Judge*. This is an appeal from an order of the district court entered on March 9, 1976, denying enforcement of two IRS summonses served upon the LaSalle National Bank and its vice-president, Joseph W. Lang. The issue presented is whether the district court erred in finding that the two summonses were issued in aid of an investigation solely for criminal purposes and were unenforceable for that reason.

I.

Special Agent John F. Olivero was conducting an investigation of the federal tax liabilities of John Gattuso. On August 15, 1975, petitioner Olivero issued the instant summonses, directing the respondent LaSalle National Bank to appear before him on September 2, 1975, to testify and to produce for examination certain books, records, and papers. Respondent Lang appeared in response to the summonses but failed to testify or produce the records demanded.

On November 11, 1975, the United States and Special Agent Olivero petitioned the district court for enforcement of the summonses pursuant to 26 U.S.C. §§ 7402(b), 7604(a).[1] The petition prayed, *inter alia*,

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[1] 26 U.S.C. § 7402(b) provides:

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurdisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

[Footnote continued on page 6a]

for an order directing the respondents to show cause why they should not comply with and obey the aforementioned summonses in each and every requirement thereof. The district court issued the order to show cause pursuant to which a hearing was held on December 5, 1975.

At the hearing, Special Agent Olivero reiterated under repeated questioning that he was attempting to determine whether or not there were any criminal violations of the Internal Revenue Code. He also testified that the purpose of his investigation was "to determine the tax liabilities for the years under investigation." In response to a direct question from the court, Olivero stated that he had not made a determination in his own mind as to whether to recommend criminal prosecution. The agent could not recall specifically reading Section 539 of the Handbook for Special Agents of the Intelligence Division, but admitted in response to another question from the court that he had not kept a chronological work sheet in connection with his investigation of the tax liability of John Gattuso. He could not recall whether he had seen any or all of the documents demanded from the respondent by the summonses.

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[3] [Continued]

26 U.S.C. § 7604(a) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which said person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

The respondents called Olivero and Gregory J. Perry as witnesses. Respondents had served a subpoena upon Olivero seeking all files concerning or relating to Gattuso but excused the agent after the district court judge indicated that respondents had not yet sustained the burden of raising a substantial question concerning the validity of the summonses. The judge indicated that he would examine the records in camera if the respondents' presentation of their case suggested that the records should be inspected. Thereupon, the respondents called Perry, who testified that he had asked Olivero at a meeting of June 11, 1975, what civil aspect of the investigation Olivero was getting into. When Olivero said "his investigation was strictly related to criminal violations" of the Internal Revenue Code but would not disclose them, the meeting quickly came to a close. Perry testified that he asked Olivero whether there was any Revenue Agent or officer assigned to the case with him and that Olivero said "no, strictly a criminal investigation."

After hearing testimony, the court stated that it had heard nothing in Agent Olivero's testimony to suggest that the thought of a civil investigation ever crossed his mind. The judge indicated that he would undertake the in camera inspection of the materials in the file in view of his understanding that if there was a possibility that information regarding civil tax liability might come up, it was a civil investigation until Olivero closed it. The judge also observed that unless he found something in the in camera inspec-

tion that gave more support to the Government's position than did Olivero's testimony, it would be the court's conclusion that Olivero was at all times involved in a criminal investigation, at least in Olivero's mind.

After considering the in camera material, the testimony, and various memoranda submitted by the parties, the district court denied enforcement of the summonses. In its Memorandum Opinion and Order, the district court recognized that it was not an improper use of an IRS summons to issue it in aid of an investigation if the issuance was prior to a recommendation for criminal prosecution and in good faith, citing *Donaldson* v. *United States*, 400 U.S. 517 (1971). The court further recognized that civil and criminal investigations might go forward side by side before a determination of the ultimate focus of the investigation was made. Again, the court recognized that the presence of a Special Agent assigned to the investigation did not automatically make it a criminal investigation. After noting that the Supreme Court in *Donaldson*, *supra*, had left no doubt that it regarded as inappropriate the issuance of an IRS summons solely for criminal purposes, the court stated:

> It is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso.

Believing that the district court had either clearly erred in this finding of fact or had acted out of a mistaken view of the law, the United States filed a notice of appeal on May 7, 1976.

II.

The first question in this case concerns our scope of review. Although the district court judge's statement that Olivero was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct was not formally labelled as either a finding of fact or a conclusion of law, we think that it must be regarded as a finding of fact. The district court judge reviewed the testimony of the two witnesses, and his performance of this function must be considered that of a fact finder.

In *United States* v. *National State Bank*, 454 F.2d 1249, 1252 (7th Cir. 1972), we recognized that the rule of *Donaldson* v. *United States*, 400 U.S. 517, 536 (1971), validated IRS summonses when issued "in good faith and prior to a recommendation for criminal prosecution." There, the district court had granted enforcement. In affirming that judgment, we characterized the essence of the district court's decision as factual findings that the summons there challenged had been "issued in an investigation of civil liability with a possibility of criminal prosecution but with no criminal prosecution pending, and was accordingly issued in good faith." *Id.* We determined that "[t]he record justified the [district] court's finding of those

facts." *Id.* Thus, this court has ruled that a finding as to good faith is a factual finding the review of which is controlled by the clearly erroneous standard of Rule 52(a), Fed.R.Civ.P.

Technically, *National State Bank, supra,* does not speak to the question of whether a converse determination is exactly analogous. In their main brief, the petitioners contend that a finding of sole criminal purpose is either a mixed finding of fact and conclusion of law or a finding of ultimate fact which involves the application of legal principles. The petitioners cite *United States* v. *Weingarden,* 473 F.2d 454, 460 (6th Cir. 1973), as authority for the proposition that, in either case, it is reviewable as a matter of law. In their reply brief, the petitioners shift position. Apparently guided in part by the respondents' vigorous argument that no other reported case holds that a finding such as that made in the instant case is not a finding of fact, the petitioners concede that *United States* v. *Cleveland Trust Company,* 474 F.2d 1234, 1236 (6th Cir. 1973), *cert. denied sub nom. Miceli* v. *United States,* 414 U.S. 866; and *United States* v. *Zack,* 521 F.2d 1366, 1369 (9th Cir. 1975), point to an opposite conclusion from that of *Weingarden.* The petitioners now argue that resolution of the question is a false issue in the case, inasmuch as it was quite clear that an improper legal test was applied in making a finding of sole criminal purpose.

We are not persuaded that an improper legal test was applied, and thus we cannot so simply evade the question. We hold that the clearly erroneous standard governs review of findings that an IRS summons has or has not issued in good faith. Assuming arguendo that the Supreme Court has not overruled or qualified *Donaldson* in its more recent adjudications, there is ample support in the record for the district court's finding of sole criminal purpose. The record establishes that Olivero testified to the existence of a civil purpose but that the district court, who observed the demeanor of the witnesses, discredited that testimony. We are not left with a firm and definite conviction that mistake has been made.

III.

The second question in this appeal is whether the district court applied the proper legal test in making its finding of fact. The reported cases establish that the various circuits, including our own, have formulated several distinct standards for quashing a summons issued under 26 U.S.C. § 7602.

The major problem in determining the proper legal test arises from the language of the *Donaldson* opinion. In the thirty-fourth paragraph of the decision, 400 U.S. at 533, the Supreme Court stated that the dictum of *Reisman* v. *Caplin,* 375 U.S. 440 (1964),[2]

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[2] The *Donaldson* opinion, 400 U.S. at 532, identified the following passage from *Reisman, supra* at 449, as dictum, referring to it thereafter as "the *Reisman* dictum":

> [T]he witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren* v. *Tucker,* 239 F.2d 767, 772-773, as well as that it is protected by the attorney-client privilege.

comes into proper focus as applicable "to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes." However, the *Donaldson* opinion used different language in the thirty-eighth and last paragraph, 400 U.S. at 536, where it stated:

> We hold that under § 7602 an internall revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

Subsequent to *Donaldson*, the courts of appeals have devoted considerable intellectual energy to the analysis of its language. Usually, the Gowernment has argued that the single standard for determining the validity of an IRS summons is the "recommendation for prosecution" standard. Although some cases have appeared to accept that position, *e.g.*, *National State Bank*, *supra* at 1252, the more recent decisions have highlighted the role of *Donaldson's* "good faith" language.

In *Weingarden*, *supra*, the Sixth Circuit noted that the formulation of the standard which authoring Justice Blackmun prefaced with the words "We hold" was technically dictum. 473 F.2d at 460. *Accord*, *United States* v. *McCarthy*, 514 F.2d 368, 374 n.7 (3d Cir. 1975); *United States* v. *Lafko*, 520 F.2d 622, 625 n.5 (3d Cir. 1975). *See also United States* v. *Friedman*, 532 F.2d 928, 932 (3d Cir. 1976). Thus, the *Weingarden* court relied instead on the *Donaldson* paragraph relating to the *Reisman* dictum, ruling that "[t]he standard is whether the sole purpose

of the issuance of the summons is for criminal prosecution." 473 F.2d at 460.

In *United States* v. *Wall Corporation*, 475 F.2d 893, 895 (D.C. Cir. 1972), the court, after setting forth the *Donaldson* paragraph dealing with the Supreme Court's "holding," stated that inquiry was not ended upon a determination that prosecution had neither been instigated nor recommended. The rationale for probing beyond mere "recommendation for prosecution" was that *Donaldson* also required that a summons be issued in "good faith." The *Wall* court stated that if it could be shown that the investigating agent had already formed a firm purpose to recommend criminal prosecution, even though he had not as yet made a formal recommendation, issuance of the summons would presumably be in bad faith. 475 F.2d at 895.

In *McCarthy*, *supra* at 373-75, the Third Circuit reviewed the precedents applicable to the "criminal purpose defense" recognized in *Reisman*, *supra*, and the "good faith" defense discussed in *Wall*, *supra*.[3] As to the first, it observed that the defendants had not alleged that a recommendation for criminal prosecution had been made prior to the issuance of the

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[3] *McCarthy* declined to follow *Weingarden*, *supra*, which it read as holding that *Donaldson* could be read as promoting the "solely for criminal purposes" test and not the "recommendation for prosecution" test. At the same time, however, *McCarthy* stated that the portion of the *Donaldson* opinion found in the last paragraph of Justice Blackmun's opinion for the court was, technically speaking, mere dictum. *See* 514 F.2d at 374 n.7.

summons. Accordingly, it ruled that the defendants' allegations were insufficient to bring the matter on unenforceability on the grounds of criminal purpose into controversy. 514 F.2d at 374. As to the latter, it determined that the defendants' allegations sufficiently raised the possibility that the IRS agents had no intention of pursuing any civil remedies as to bring into question their good faith. *Id.* at 375. Accordingly, it held that the district court should conduct a hearing concerning the issues raised by the allegations of the absence of civil purpose.

More recently, the Third Circuit has apparently retreated from an effort to approach *Donaldson* through an analysis distinguishing its holding from its supposed dictum. In *Friedman*, *supra*, 532 F.2d at 932, the court stated that the standards for judicial enforcement of a § 7602 summons were found in *Donaldson*, and explained in *McCarthy*, *supra*, and even more recently, in *Lafko*, *supra*. The *Friedman* opinion explains that these cases recognize that the IRS has no authority to conduct a criminal investigation through the use of a § 7602 civil summons, noting that no court has given a thorough or persuasive justification for this construction. 532 F.2d at 932 n.9. The *Friedman* case recognizes that *Donaldson* and the Third Circuit cases hold that the mere fact that criminal as well as civil liability may result will not prevent judicial enforcement if (1) the Intelligence Division has not yet recommended prosecution, (2) the agent has not already formed a firm purpose to recommend prosecution, (3) the summons is not

being used to harass the taxpayer, and (4) the material referred to in the summons has not already been inspected by the Government. *Id.* at 932.

The *Friedman* formulation of a four-prong basis for denying enforcement of an IRS summons represents a careful articulation of the principles gleaned from the many cases considering the validity of particular summonses. As an *a priori* approach, its analysis has much to recommend it. However, we can hardly fail to note that the *Friedman* analysis sedulously avoids any use of the phrase "in good faith," substituting instead a reformulation which sets forth the circumstances under which denial of enforcement is proper. Instead of attempting exegesis of the language of *Donaldson*, the *Friedman* case traces the contours of precedent back to the original formulation of a rationale by Judge Wyzanski in *United States* v. *O'Connor*, 118 F.Supp. 248 (D. Mass. 1953).

The Ninth Circuit has taken a different approach. In *United States* v. *Zack*, *supra*, 521 F.2d 1366, the court reviewed a district court order denying enforcement of an IRS summons. The lower court had conducted a hearing and made a finding of fact that the investigation's sole purpose was to establish criminal liability. Upon the Government's appeal, the court followed *Weingarden's* ruling, 473 F.2d at 460, that an IRS summons, if issued solely for criminal purposes is not issued in good faith, even though there has been no recommendation for prosecution. Thus, *Zack* determined that indictment or recommendation of criminal prosecution was not a prerequisite to a

finding that an investigation is solely criminal. 521 F.2d at 1368.

Significantly, *Zack* again found it necessary to reconcile the various pasages in the *Donaldson* opinion. After directing attention to that portion of the opinion discussing the *Reisman* dictum, *see* 400 U.S. at 533, *Zack* turned to the last, "holding" paragraph. It concluded that even prior to a recommendation for criminal prosecution, an administrative summons should not be enforced unless it is issued in good faith. The court explained, *supra* at 1368:

> We harmonize this "good faith" requirement with the language disapproving the use of the summons in "an investigation solely for criminal purposes" by concluding that the government would not be in good faith if it uses an administrative summons solely for criminal prosecution purposes. Thus, in this case, if the administrative summons was used solely for criminal purposes, it is not issued in good faith and is impermissible. This is true even though there has been no recommendation for prosecution.

In carrying out its hermeneutical task, the *Zack* court took no position on the characterization of the concluding *Donaldson* paragraph as holding or dictum.

A review of the cases from other circuits establishes to our satisfaction that the *Donaldson* opinion has engendered some confusion. Accordingly, we shall take at face value the words of the authoring Justice and characterize the final paragraph of the opinion for the court as constituting a holding of *Donald-*

son.[4] Thus, it is proper for a district court to grant enforcement of an IRS summons if it is issued in good faith and prior to a recommendation for criminal prosecution. Conversely, if a summons is issued in bad faith or after a recommendation for prosecution, enforcement must be denied.[5]

We agree with the respondents that the petitioners' arguments ignore the good faith requirement of *Donaldson*. We further agree that the real issue before the court is whether the Internal Revenue Service may issue a summons solely in aid of a criminal investigation and still meet the standard of good faith as enunciated in *Donaldson*. Because we are persuaded that *Zack's* reconciliation of the various

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[4] The courts have characterized the final paragraph as mere dictum because the Supreme Court did not have to rule on the sufficiency of the taxpayer's claims, one of which was the criminal purposes defense. *See, e.g., McCarthy, supra.* 514 F.2d at 374 n.7. However, the Supreme Court was perfectly aware that its holding that the taxpayer's interest was not of sufficient magnitude to support intervention effectively disposed of the case. In *Donaldson, supra* at 531, the authoring Justice states, prior to Part VII's resolution of Donaldson's arguments, that "[t]his conclusion [*i.e.*, insufficient interest to support intervention] could dispose of the case, for our *main concern* here is with the taxpayer's asserted right to intervention in the particular enforcement proceedings." (Emphasis supplied.) That the Court went on to examine its *Reisman* dictum appears to us an intentional formulation of an alternative holding.

[5] Although our prior cases of *United States* v. *Turner*, 480 F.2d 272 (7th Cir. 1973); and *United States* v. *Awerkamp*, 497 F.2d 832 (7th Cir. 1974), use different phraseology, they are consistent with this interpretation of *Donaldson*.

Donaldson paragraphs accurately delineates what the Supreme Court has held, we must reject the petitioners' arguments.

The Government insists that there was no evidence that Special Agent Olivero was not simultaneously pursuing a civil investigation. Reading the record evidence in this fashion, the petitioners submit that it is clear that the special agent's investigation encompassed the purpose of determining the taxpayer's tax liability. Suggesting that the district court misfocused its inquiry, the petitioners insist that the only relevant inquiry is whether the investigation in aid of which the summons is issued is directed at least in part toward determining the liability of some person for an internal revenue tax.[6] The Government argues that once it is demonstrated that there is nothing unusual or sinister about the special agent focusing his attention on the criminal aspects of the case, the finding of sole criminal purpose must fall.

We think that the Government oversimplifies the evidentiary posture of the case. Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him.

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[6] In their main brief, the petitioners state that "[i]t is the government's position that a summons may be used solely for the purpose of criminal investigation at any time prior to the final recommendation for criminal prosecution." They found it unnecessary to advance the argument because of their view that the evidence in this case clearly established that the special agent's investigation encompassed a civil aspect.

We note that the district court expressly observed that the bona fides of the investigation was in issue. The Government attempts to use the district court's statement as an indication that it applied the wrong legal test. Our reading of the reported cases persuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith. In view of our reading of the crucial language in *Donaldson*, *see* 400 U.S. at 536, we read the statement as a faithful reflection of that decision's alternative holding.

We have examined subsequent Supreme Court decisions, such as *Couch* v. *United States*, 409 U.S. 322 (1973); *Beckwith* v. *United States*, 425 U.S. 341 (1976); and *Fisher* v. *United States*, 425 U.S. 391 (1976). Although those cases establish that a taxpayer is clearly the "focus" of a criminal investigation when the matter is assigned to the Intelligence Division of the Internal Revenue Service, they do not reflect in our reading of them any intent of the Supreme Court to qualify or cut back its holding in *Donaldson*, *supra* at 536. Accordingly, the "bad faith" test spelled out by that decision is controlling law.

We note that the district court formulated its factual finding by use of the expression "sole criminal purpose" rather than by a label such as "bad faith." We find no basis for reversible error in that verbal formulation. The district court grasped the vital core of *Donaldson* and rendered its factual find-

ing consistently therewith. Accordingly, its order denying enforcement of the two IRS summonses is AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

Opinion by Judge Pell

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 76-1572

April 11, 1977

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM G. EAST, Senior District Judge *

UNITED STATES OF AMERICA AND JOHN F. OLIVERO, Special Agent of the Internal Revenue Service,
PETITIONERS-APPELLANTS

v.

LA SALLE NATIONAL BANK AND JOSEPH W. LANG, Vice-President of the LaSalle National Bank,
RESPONDENTS-APPELLEES

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 75-C-3842

FRANK J. MC GARR, Judge

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* Honorable William G. East, Senior Judge, United States District Court for the District of Oregon, sitting by designation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS

(a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all with respect to which any tax is imposed.

(b) *Penalties.*—

For penalties applicable to forcible obstruction or hinderance of Treasury officers or employees in the performance of their duties, see section 7212.

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7608 [as added by Sec. 204(14), Excise Tax Technical Changes Act of 1958, P.L. 85-859, 72 Stat. 1275]. AUTHORITY OF INTERNAL REVENUE ENFORCEMENT OFFICERS.

* * * *

(b) [as added by Sec. 6(a)(1), Act of October 23, 1962, P.L. 87-863, 76 Stat. 1141] *Enforcement of Laws Relating to Internal Revenue Other Than Subtitle E.*—

(1) Any criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal Revenue Service whom the Secretary or his delegate charges with the duty of enforcing any of the criminal provisions of the internal revenue laws or any other criminal provisions of law relating to the internal revenue for

the enforcement of which the Secretary or his delegate is responsible is, in the performance of his duties, authorized to perform the functions described in paragraph (2).

(2) The functions authorized under this subsection to be performed by an officer referred to in paragraph (1) are—

(A) to execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under authority of the United States;

(B) to make arrests without warrant for any offense against the United States relating to the internal revenue laws committed in his presence, or for any felony cognizable under such laws if he has reasonable grounds to believe that the person to be arrested has committed or is committing any such felony; and

(C) to make seizures of property subject to forfeiture under the internal revenue laws.

SEC. 7801. AUTHORITY OF DEPARTMENT OF THE TREASURY.

(a) *Powers and Duties of Secretary.*—Except as otherwise expressly provided by law, the administration and enforceemnt of this title shall be performed by or under the supervision of the Secretary of the Treasury.

* * * *

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Supreme Court, U.S.
FILED
JAN 26 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-365

UNITED STATES OF AMERICA and JOHN F. OLIVERO,
Special Agent of the Internal Revenue Service,
Petitioners

—v.—

LASALLE NATIONAL BANK and JOSEPH W. LANG,
Vice-President of the LaSalle National Bank

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 7, 1977
CERTIORARI GRANTED DECEMBER 12, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-365

UNITED STATES OF AMERICA and JOHN F. OLIVERO,
Special Agent of the Internal Revenue Service,
Petitioners

—*v.*—

LASALLE NATIONAL BANK and JOSEPH W. LANG,
Vice-President of the LaSalle National Bank

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Docket Entries	1
Petition to Enforce Internal Revenue Summons	5
Answer	20
Transcript of Proceedings:	
Testimony of John F. Olivero	26
Testimony of Gregory J. Perry	51
Memorandum of Petitioners	65
Respondents' brief in opposition to enforcement of Internal Revenue Service Summons	72
Respondents' Reply	85
Notice of Appeal	91
Order of the Supreme Court of the United States allowing certiorari	92

DOCKET ENTRIES

DATE	PROCEEDINGS

11-11-75 Filed petition to enforce Internal Revenue Summons.

11-11-75 Filed civil cover sheet. T

11-19-75 Enter order dated November 18, 1975: On motion of government, enter order to show cause why respondents should not be compelled to obey the Internal Revenue Service summons served upon them on August 15, 1975, by petitioner, Special Agent John F. Olivero, returnable on December 5, 1975 at 10:00 a.m. Petition and order to be served on or before November 25, 1975, with response to be filed 5 days after service. DRAFT—McGarr, J.
Mailed notices 11-19-75. T

11-19-75 Issued 2 certified copies of rule to show cause with 2 copies of petition to enforce IRS summons as to Joseph W. Lang and LaSalle National Bank. T

11-21-75 Filed appearance of LaSalle National Bank and Joseph W. Lang and that of Matt P. Cushner as attorney for said defendants. c

11-21-75 Filed affidavit of Matt P. Cushner pursuant to General Rule 39. c

11-24-75 Filed defendant's notice of taking deposition of Plaintiff John F. Olivero, Special Agent.

11-24-75 Filed defendant's notice of taking deposition of Thomas G. Wilmowski, Special Agent. c

11-26-75 Filed Plaintiff's motion for protective order and motion to quash subpoena.

11-26-75 Filed Defendants' motion to reset deposition of Special Agent Olivero, for an extension of time to respond to petition and to reset the hearing date.

DATE	PROCEEDINGS

12-1-75 Enter order dated November 26, 1975:

Deposition of Special Agent Olivero to be deferred. Hearing date to stand. Ruling on discovery is deferred until hearing on December 5, 1975 is completed—McGarr, J.

Mailed notices 12-1-75. c

11-28-75 Filed Marshal's return of Petition to Enforce IRS Summons, returned served on LaSalle National Bank.

11-28-75 Filed Marshal's return of Petition to enforce IRS summons, returned served on Joseph W. Lang, Vice President LaSalle, National Bank. Y

12-3-75 Filed Defendants' notice of motion to dismiss.

12-3-75 Filed Defendants' motion to dismiss.

12-3-75 Filed Defendants' memorandum in support of respondents' motion to dismiss.

12-4-75 Enter order dated December 3, 1975:

Leave given respondents to file motion to dismiss, with response to be filed by the afternoon of December 4, 1975. Hearing is reset from 10:00 a.m. on December 5, 1975 to 3:00 p.m.—McGarr, J.

Mailed notices 12-4-75. c

12-8-75 Enter order dated December 5, 1975.

Leave given Government to file opposition to respondents motion to dismiss. Motion to dismiss is denied. Arguments and evidence heard and concluded. John F. Olivero not to submit to deposition.

In camera inspection of petitioners documents to be made by Court. Parties to file simultaneously memorandum on December 17, 1975. Cause taken under advisement.—McGarr, J.

Mailed notices 12-8-75. Y

12-10-75 Filed Marshal's return of deposition subpoena returned served on Thomas G. Wilmowski, Special Agent.

DATE	PROCEEDINGS

12-10-75 Filed Marshal's return of deposition subpoena returned served on John F. Olivero. Y

12-12-75 Filed Defendants' answer. c

12-18-75 Enter order dated December 17, 1975:

Enter order granting parties an extension of time to file briefs to and including December 22, 1975.—McGarr, J.

Mailed notices 12-18-75. c

12-19-75 Clerk's file copy of transcript of proceedings had before Judge McGarr on December 5, 1975, filed by Official Court Reporter. (one volume) c

12-23-75 Filed Respondents' brief in opposition to enforcement of Internal Revenue Service summons.

12-24-75 Enter order dated December 23, 1975:

Motion to file respondents' brief in opposition to enforcement of Internal Revenue Service summons instanter is granted. Enter order.—McGarr, J.

Mailed notices 12-24-75. c

12-29-75 Filed Memorandum of Petitioners. U

12-30-75 Filed respondents notice of motion with motion to file reply Memorandum. Y

12-31-75 Enter order dated December 30, 1975.

Enter order: Respondents' motion for leave to file a reply Memorandum on or before January 9, 1976 is granted.—McGarr, J.

Mailed notices 12-31-75. Y

1-9-76 Filed respondents' reply to memorandum. c

3-10-75 Enter order dated March 9, 1976: Pursuant to memorandum opinion and order entered this day, the petition of the The United States of America and John F. Olivero, Special Agent of the Internal Revenue Service, for the enforcement of Internal Revenue summonses served upon the respondent. LaSalle National Bank, is denied. Draft. McGarr, J.

Notices mailed 3-10-76. k

DATE	PROCEEDINGS
5-7-76	Filed plaintiff-appellants' notice of appeal. fd'a
5-7-76	Transmitted copy of notice of appeal and copy of docket entries to U.S.C.A. 7th Circuit. fd'a
5-7-76	Mailed copy of notice of appeal to Matt P. Cushner, 180 North LaSalle Street, Chicago, Illinois. fd'a

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent, Internal Revenue Service, PETITIONERS

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of LaSalle National Bank, RESPONDENTS

PETITION TO ENFORCE INTERNAL REVENUE SUMMONSES

Now come the United States of America and Special Agent John F. Olivero, Internal Revenue Service, by their attorney, Samuel K. Skinner, United States Attorney for the Northern District of Illinois, and show unto this Court as follows:

I

This is a proceeding brought under the authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C., §§ 7402(b) and 7604(a), to judicially enforce an Internal Revenue summons.

II

The petitioner, John F. Olivero, is a special agent of the Internal Revenue Service employed at Chicago, Illinois, and is authorized to issue Internal Revenue summonses under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C., § 7602.

III

The respondents, LaSalle National Bank and Joseph W. Lang, maintain an office within the jurisdiction of this Court at Chicago, Illinois.

IV

The petitioner, Special Agent John F. Olivero, is conducting an investigation of the federal tax liabilities for the years 1970, 1971 and 1972 of John Gattuso who resides at 1721 Sunset Ridge, Glenview, Illinois, within the jurisdiction of this Court.

V

The respondents, LaSalle National Bank and Joseph W. Lang, have books and records relating to the tax liabilities involved in the investigation referred to in paragraph IV above, and the respondents have knowledge thereof to which they can testify.

VI

On August 15, 1975, two Internal Revenue summonses were issued by the petitioner, Special Agent John F. Olivero, directing the respondent, LaSalle National Bank to appear before the petitioner, Special Agent John F. Olivero, at the offices of the Internal Revenue Service, Intelligence Division, Room 2500, 230 South Dearborn, Chicago, Illinois, on September 2, 1975, at 10:00 a.m. to testify and to produce for examination certain books, records and papers all as set forth in the attached affidavit and summonses. Attested copies of the summonses were personally served upon the respondents by the petitioner, Special Agent John F. Olivero, on August 15, 1975, by handing it to the respondent, Joseph W. Lang, at the office of LaSalle National Bank, Chicago, Illinois. Copies of the summonses issued to the respondents are attached hereto and incorporated herein as Exhibits A and B.

VII

The respondents appeared in response to the summonses issued to the LaSalle National Bank and described in paragraph VI above, but failed and refused to

testify or produce the books, records, and papers as demanded by the summonses, and such failure and refusal continues to the date of this petition.

VIII

The information contained in the documents not produced in accordance with the summonses is not in the possession of the petitioners.

IX

It was and now is essential to the determination of the tax liabilities of John Gattuso for the years 1970, 1971 and 1972, that the respondents be required to testify and produce the records demanded, as is evidenced by the affidavit of the petitioner, Special Agent John F. Olivero, attached hereto as Exhibit C and incorporated herein as part of this application.

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondents, LaSalle National Bank and Joseph W. Lang, to show cause, if any they have, why they should not comply with and obey the aforementioned summonses in each and every requirement thereof.
2. That the Court enter an order directing the respondents, LaSalle National Bank and Joseph W. Lang, to obey the aforementioned summons and each and every requirement thereof, and ordering their attendance and testimony and the production of the books, records and papers as required and called for by the terms of the summons, before Special Agent John F. Olivero, or any other proper officer of the Internal Revenue Service, at such time and place as may hereafter be fixed by Special Agent John F. Olivero, or any other proper officer of the Internal Revenue Service.
3. That the United States recover its costs in maintaining this action.

4. That the Court render such other and further relief as is just and proper.

SAMUEL K. SKINNER
United States Attorney

By: _____
Assistant United States Attorney

EXHIBIT B

SUMMONS

Department of the Treasury

[SEAL]

Internal Revenue Service

In the matter of the tax liability of

JOHN GATTUSO
1721 Sunset Ridge
Glenview, Illinois 60025

Internal Revenue District of Chicago

Period(s) 1970 to 1972 inclusive

The Commissioner of Internal Revenue

To LA SALLE NATIONAL BANK

As Trustee for Trust No. 31544

At 135 South La Salle Street, Chicago, Illinois

Greetings: You are hereby summoned and required to appear before Special Agent JOHN F. OLIVERO an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

Your files relating to Trust No. 31544 including the Trust Agreement and any changes thereto and assignments of the beneficial interest or power of direction in effect during the period January 1, 1970 through December 31, 1972. Also with respect to Trust No. 31544 all deeds, options, correspondence, closing statements and sellers statements, escrows, and tax bills pertaining to all property held in the trust at any time during the period January 1, 1970 through December 31, 1972.

Place and time for appearance: at IRS, Intelligence Division, Room 2500, 230 South Dearborn, Chicago, Illinois on the 2nd day of September, 1975 at 10:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 15th day of August, 1975

Original

/s/ John F. Olivero
Signature
Special Agent 353-3330
Title

[SEAL]

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date	Time
August 15, 1975	3:37 p.m.

How Summons Was Served:

☒ I handed an attested copy of the summons to the person to whom it was directed

/s/ Joseph W. Lang
Vice President

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

---

Signature	Title
John F. Olivero	Special Agent

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production

of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

EXHIBIT A

SUMMONS

Department of the Treasury

[SEAL]

Internal Revenue Service

In the matter of the tax liability of

JOHN GATTUSO
1721 Sunset Ridge
Glenview, Illinois 60025

Internal Revenue District of Chicago

Period(s) 1970 to 1972 inclusive

The Commissioner of Internal Revenue

To LA SALLE NATIONAL BANK
As Trustee for Trust No. 35396

At 135 South La Salle Street, Chicago, Illinois

Greetings: You are hereby summoned and required to appear before Special Agent JOHN F. OLIVERO an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

Your files relating to Trust No. 35396 including the Trust Agreement and any changes thereto and assignments of the beneficial interest or power of direction in effect during the period January 1, 1970 through December 31, 1972. Also with respect to Trust No. 35396 all deeds, options, correspondence, closing statements and sellers statements, escrows, and tax bills pertaining to all property held in the trust at any time during the period January 1, 1970 through December 31, 1972.

Place and time for appearance: at IRS, Intelligence Division, Room 2500, 230 South Dearborn, Chicago, Illinois

on the 2nd day of September, 1975 at 10:00 o'clock A.M. Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 15th day of August, 1975

Original

/s/ John F. Olivero
Signature
Special Agent 353-3330
Title

[SEAL]

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code

I certify that I served the summons shown on the front of this form on:

Date	Time
August 15, 1975	3:37 p.m.

How Summons Was Served:

☒ I handed an attested copy of the summons to the person to whom it was directed

/s/ Joseph W. Lang
Vice President

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

---

Signature	Title
John F. Olivero	Special Agent

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production

of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent, Internal Revenue Service, PETITIONERS

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of LaSalle National Bank, RESPONDENTS

AFFIDAVIT

JOHN F. OLIVERO, a petitioner herein, being first duly sworn, deposes and says:

1. That he is a duly commissioned special agent of the Intelligence Division of the Internal Revenue Service with post of duty in Chicago, Illinois, and performing his duties under the District Director of Internal Revenue, Chicago, Illinois.

2. That in his capacity as a special agent he is assigned to investigate the tax liabilities of John Gattuso of Glenview, Illinois, for the calendar years 1970, 1971 and 1972.

3. That pursuant to such investigation and in accordance with Sections 7602 and 7603 of the Internal Revenue Code of 1954, 26 U.S.C., §§ 7602 and 7603, two summonses, Treasury Form 2039 were served upon LaSalle National Bank and Joseph W. Lang on August 15, 1975, by your affiant personally handing attested copies of the summonses to Joseph W. Lang at the offices of LaSalle National Bank, Chicago, Illinois. The summonses, copies of which are attached as Exhibits A and B to this application and made a part hereof, directed the respondent, LaSalle National Bank, to appear before your affiant on September 2, 1975, at 10:00 a.m. at the offices of the Internal Revenue Service, Intelligence Division, Room 2500, 230 South Dearborn, Chicago, Illinois, then and there to

give testimony and produce records relating to the tax liabilities of John Gattuso for the years 1970, 1971 and 1972.

4. That the respondents, LaSalle National Bank and Joseph W. Lang, appeared in response to the summonses described in paragraph 3 above, but failed and refused to testify and to produce the books, records and papers as demanded by the summonses, and such failure and refusal continues to the date of this affidavit.

5. That the testimony and records demanded by the summonses served upon the respondents are relevant and necessary for the determination of the tax liabilities of John Gattuso for the years 1970, 1971 and 1972.

6. That the information contained in said documents is not in the possession of petitioners.

_____

JOHN F. OLIVERO
Special Agent,
Intelligence Division
Internal Revenue Service

Sworn to and subscribed before me this —— day of ————————, 1975.

_____

Notary Public

My commission expires: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent, Internal Revenue Service, PETITIONERS

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of LaSalle National Bank, RESPONDENTS

ORDER TO SHOW CAUSE

Upon the petition, the exhibit attached thereto, the affidavit of Special Agent John F. Olivero, Internal Revenue Service, and upon the motion of Samuel K. Skinner, United States Attorney for the Northern District of Illinois, it is

ORDERED, that LaSalle National Bank and Joseph W. Lang, appear before the United States District Court for the Northern District of Illinois, in that branch thereof presided over by the undersigned, on the ——day of ————————, 1975, at ——— —.m., to show cause why they should not be compelled to obey the Internal Revenue Service summonses served upon them on August 15, 1975. It is further

ORDERED, that a copy of this order, together with the Petition and Exhibits thereto, be served upon LaSalle National Bank and Joseph W. Lang on or before the ——day of ————————, 1975. It is further

ORDERED, that the respondents shall file a written response to the petition within five (5) days after service of the petition upon them.

DATED at Chicago, Illinois, this —— day of ————, 1975.

_____

United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent, Internal Revenue Service, PETITIONERS

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of LaSalle National Bank, RESPONDENTS

ANSWER

NOW COME the respondents, LaSalle National Bank and Joseph W. Lang, by their attorney, Matt P. Cushner, in answer to the Petition herein states as follows:

I

That if jurisdiction exists at all, it exists pursuant to Section 7402(b) and 7604(a) of the Internal Revenue Code of 1954.

II

The respondents do not have sufficient information to affirm or deny the allegations contained in Paragraph 2, of the Petition herein, and therefore denies them.

III

The respondents admit the allegations contained in Paragraph 3 of the Petition.

IV

The respondents do not have sufficient information to admit or deny the allegations contained in Paragraph 4 of the Petition herein, and therefore, denies them.

V

The respondents deny the allegations contained in Paragraph 5 of the Petition.

VI

The respondents admit that on August 15, 1975, two Internal Revenue summonses were served on the respondents requiring them to appear before Special Agent John F. Olivero at the office of the Internal Revenue Service, Intelligence Division, Room 2500, 230 South Dearborn Street, Chicago, Illinois on September 2, 1975 at 10:00 a.m. The respondents deny all other allegations contained in Paragraph 6 of the Petition.

VII

The respondents admit that they appeared in response to the summonses issued herein in full accordance with all laws and regulations pertaining thereto. Respondents deny any and all other allegations contained in Paragraph 7 of the Petition.

VIII

Respondents deny each and every allegation contained in Paragraph 8 of the Petition.

IX

Respondents deny each and every allegation contained in Paragraph 9 of the Petition.

WHEREFORE, the respondents respectfully pray:

1. That this court enter an Order dismissing the Petition herein with prejudice, with all costs to the respondents.
2. That this court enter an Order directing the petitioners to pay all witness fees as required by Title 5, U.S.C. Section 503.
3. That this court enter an Order granting attorney's fees to the respondents herein.

4. That this court render such other and further releases as is just and proper.

LaSalle National Bank and
Joseph Lang, Vice President

By Matt P. Cushner
MATT P. CUSHNER

PEDERSEN & HOUPT
180 North LaSalle Street
Suite 3400
Chicago, Illinois 60601
641-6888

AFFIDAVIT OF MAILING

I, HORTENSE M. ROSS, being first duly sworn on oath, depose and say that I served the foregoing Answer by mailing a true and correct copy of same to:

Stan Kubacki
U.S. Attorney's Office
219 South Dearborn Street
Chicago, Illinois 60602

Joseph Gontram
Tax Division
Department of Justice
Washington, D.C.

with proper postage prepaid, and depositing same in the U.S. mail chute located at 180 North LaSalle Street, Chicago, Illinois 60601, at the hour of approximately 5:00 p.m. on the 12th day of December, 1975.

/s/ Hortense M. Ross,

[SEAL]

SUBSCRIBED and SWORN TO
before me this 12th day
of December, 1975.

/s/ [Illegible]
Notary Public

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

UNITED STATES OF AMERICA and JOHN F. OLIVERO,
Special Agent, Internal Revenue Service, PETITIONERS

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of LaSalle National Bank, RESPONDENTS

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on December 5, 1975, at the hour of 3:30 o'clock p.m..

PRESENT:

HON. SAMUEL K. SKINNER,
United States Attorney
(219 South Dearborn Street, 15th Floor,
Chicago, Illinois, 60604), by
MR. ROBERT A. FILPI and
MR. JOSEPH GONTRAM,
Assistant United States Attorneys,

appeared on behalf of the Government;

MESSRS. PEDERSEN & HOUPT
(180 North LaSalle Street, Room 3400,
Chicago, Illinois, 60601), by
MR. MATT P. CUSHNER and
MR. GREGORY J. PERRY,

appeared on behalf of the respondents.

[2] THE CLERK: 75 C 3842, United States versus LaSalle National Bank.

THE COURT: Gentlemen, gather around up here and give me a status report.

THE CLERK: A return on an order to show cause why respondent should not be compelled to obey and turn over Revenue Service summons.

MR. FILPI: Good afternoon. I would like to introduce Mr. Gontram from the Department of Justice, Tax Division in Washington D.C. on behalf of the Government's case.

THE COURT: How do you do, sir.

Mr. Cushner—

MR. CUSHNER: Good afternoon.

THE COURT: Do I understand that you have what, how many witnesses that you think we ought to hear.

MR. CUSHNER: I have only one witness, your Honor.

THE COURT: I think what we should do, because we are getting a late start, and to serve the convenience of the witnesses, just put them on, get on the record whatever you think they should say and then if we have to go a little late in argument we will work it out.

MR. CUSHNER: Fine. I believe before we go to the witnesses though we have a pending Rule 12 motion which I understand your Honor was reserving decision on until today. I understand the government have not filed a [3] response to my motion. I would like to argue it, I assume the government would—

MR. GONTRAM: Your Honor, through an advertence the opposition was not filed. I have the original here to be filed.

MR. CUSHNER: Your Honor, I will object to the filing of this. I made a special call specifically to the U.S. Attorneys office yesterday to inquire whether any response was to be filed on Thursday, which is the day in which your Honor agreed to let him respond. Your Honor, they indicated to me that no response would be filed by the government. This catches me totally by surprise. I am not prepared to answer whatever allegations or law may be contained in this motion. I think that that motion

should be considered before the witnesses are put on. I would like an opportunity to examine this and to reply to it.

MR. GONTRAM: Your Honor, if I may briefly reply to that. The opposition is one page and it is simply, directly responsive to the motion filed by the respondent. I do not believe that this type of an opposition could possibly be taken by surprise.

MR. CUSHNER: This one page could have been filed yesterday and I assume anything could be filed would be in response to my motion, I don't think that that should change the situation.

[4] THE COURT: We are talking about how many witnesses, just Mr. Lang, or are there others?

MR. GONTRAM: The government, your Honor, would like to put on Special Agent Olivero initially.

THE COURT: I am talking about the motion to dismiss. That has to do with the failure of the government to tender along with the summons on Joseph Lang, the vice president of the LaSalle National Bank, the appropriate witness fees and mileage fees—is that the only witness?

MR. CUSHNER: No, your Honor, we didn't put him on. I didn't think there was going to be any controversy over the fact that witness fees have never been tendered, unless the government feels that that is—

THE COURT: If that is the basis for the motion—

MR. CUSHNER: That is correct.

THE COURT: That on that sole basis—

MR. GONTRAM: I don't believe there are any factual contentions with respect to that.

THE COURT: All right, the government did not tender the witness fees—

MR. GONTRAM: That is correct.

THE COURT: All right, I doubt—I think the government should have obviously but I doubt it is an adequate basis for a dismissal of the action. So I will deny the motion in that regard, whether Mr. Lang is here or not or whether [5] he should be is something else again, but in the meantime, the motion to dismiss is denied.

Let's go forward with the witnesses we have here and then I will hear you on the totality of the issues.

Who do you want to put on first?

MR. GONTRAM: Special Agent Olivero, who is the petitioner in this case.

THE COURT: Call him.

Mr. Olivero, would you take the stand, please.

(Witness duly sworn.)

JOHN F. OLIVERO,

called by the government as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GONTRAM:

Q Will you state your name, please, sir?
A John Olivero.
Q By whom are you employed?
A The Internal Revenue Service.
Q In what capacity?
A Special Agent.
Q How long have you been employed as a Special Agent?
A Approximately 16 years.
Q In your capacity as a Special Agent, were you [6] assigned to investigate John Gattuso?
A Yes.
Q Would you describe the purpose of that investigation?
A To determine the tax liabilities for the years under investigation.

MR. CUSHNER: Your Honor, I will object to the question, it is calling for a conclusion. If he would ask him what he was told in the assignment I would have no objection. He is asking the witness to characterize the investigation.

THE COURT: We don't have a jury Mr. Cushner, while it is an appropriate objection I don't think we need be that technical for purposes of a bench trial, so it is overruled. Go ahead.

BY MR. GONTRAM:

Q Mr. Olivero, would you describe your focus as a Special Agent in this investigation?
A To investigate the possibility of criminal violations of the Internal Revenue Code.
Q Were you conducting this investigation on August 15, of 1975?
A Yes, sir.
Q What tax years are involved in your investigation?
A 1970, 1971 and 1972.
[7] Q During the course of this investigation did you determine that it was necessary to obtain testimony and documents from the LaSalle National Bank with respect to John Gattuso?

MR. CUSHNER: Objection your Honor. I believe again this calls for a conclusion of the witness. If he would like to ask the witness what it is that he did in conducting this investigation, what led him to ask for these records, I would have no objection. He is skipping over very important parts.

MR. GONTRAM: I will get into that.

THE COURT: He went to LaSalle National Bank, whether he determined he should go or just went doesn't seem to be too relevant. Go ahead.

BY MR. GONTRAM:

Q What caused you to decide to obtain testimony and documents from LaSalle National Bank?
A The income tax returns of the taxpayer disclosed rental income from real property. Then it was necessary to go to LaSalle Bank, who has custody of the trust files to obtain those documents to determine the accuracy of the items reported.

THE COURT: Was the property identified as being held in trust and owned by the LaSalle National Bank, is that why you went?

THE WITNESS: Yes, sir.

[8] THE COURT: I am trying to figure out why you connected the LaSalle National Bank with this property.

THE WITNESS: It was determined that LaSalle National Bank did have custody of the trust file.

THE COURT: All right, go ahead.

MR. GONTRAM: Mr. Reporter will you please mark these as Petitioner's Exhibits 1 and 2.

(Whereupon, said documents were marked as Petitioner's Exhibit Nos. 1 and 2 for identification.)

BY MR. GONTRAM:

Q Mr. Olivero, would you please examine two documents marked as Petitioner's Exhibits 1 and 2.

Can you identify those documents?

A Yes, sir.

Q What are they?

A These documents are summons prepared at my direction, served upon the LaSalle National Bank calling for specific trust files. These documents were served on the LaSalle National Bank on August 15th of 1975, returnable on September 2, 1975, and served upon Joseph W. Lang, Vice President, on August 15, 1975.

Q By whom were they served?

A By me.

Q Is that your signature on each of those [9] documents?

A Yes, sir, it is.

Q Will you state the return date in the summons, of both summonses, that is Petitioner's Exhibits 1 and 2, was it September 2 of 1975?

A That is correct.

Q What if anything occurred on September 2 of 1975?

A Mr. Cushner, I believe, to the best of my recollection, Mr. Cushner called me and asked if we couldn't meet at the LaSalle National Bank for the return of

the service on the summons—rather at the Intelligence Division office. I agreed. I appeared at the LaSalle National Bank, and was told by Mr. Lang, that the bank would not turn over the records pursuant to the direction of Mr. Cushner.

Q Had you been informed prior to this time why LaSalle National Bank was not going to comply with this summons?

A On a previous occasion Mr. Cushner told me that one of the reasons he wasn't going to have the bank comply with the summons is that he is buying time, and on this occasion he said he thought it was an improper summons.

MR. CUSHNER: Objection to this testimony. He failed to state on what occasion, the time, the date, the place, who was present at the conversation—I [10] object to the testimony.

THE COURT: I will overrule the objection if he will lay that foundation, counsel.

BY MR. GONTRAM:

Q On what occasion was the statement made?

A The LaSalle National Bank was served with two other summons on a previous date, and the time for which the summonses would be returned, I believe, that was the time which Mr. Cushner—

THE COURT: Where was it that you had this conversation with Mr. Cushner, who else was present, and to the best of your recollection what date was it, on or about what date—first, was it in person or by phone?

THE WITNESS: No, it was in person.

THE COURT: Where was it?

THE WITNESS: It was in the office of the Intelligence Division, and it was on, I believe the date subsequent to the time that the first summons was issued.

THE COURT: Prior to the return date—in other words, what I am asking is, that sometime between August 15, '75 and September 2, '75—

THE WITNESS: Yes, sir, I believe it was.

THE COURT: Go ahead.

[11] BY MR. GONTRAM:

Q Mr. Olivero, had you completed your investigation of John Gattuso on August 15, 1975?
A No, sir.
Q Have you completed it at the present time?
A No, sir.
Q When you do complete a investigation, do you make recommendations as to whether further action may be warranted?
A Yes, sir.
Q What are the possible recommendations that you can make in an investigation of this type?
MR. CUSHNER: Your Honor, I object to this. I fail to see the relevance of his hypothetical question as to what recommendations the Special Agent may or may not make.
THE COURT: Well, I don't see how it helps, counsel. I will sustain the objection.
The fact is, you have not completed the Gattuso investigation and you are still awaiting these records.
THE WITNESS: That is correct.
THE COURT: Anything else, counsel?

BY MR. GONTRAM:

Q Have you at anytime made a recommendation that John Gattuso be recommended for criminal prosecution?
[12] A No.
Q Has the Internal Revenue Service made such a recommendation?
A No, sir.
Q Are the documents and testimony that you seek that are sought by the summonses in this case necessary to ascertain an accurate statement of the tax liabilities of John Gattuso?
MR. CUSHNER: I object to that question, your Honor. It is again asking for a conclusion of this witness.
MR. GONTRAM: Your Honor, this is not a conclusion.

MR. CUSHNER: He is asking the witness if these are necessary, if they are necessary let him explain how they are necessary.
THE COURT: He may answer.
Do you feel they are necessary?
THE WITNESS: Yes, sir.
THE COURT: You made the determination in your own mind as to whether to recommend criminal prosecution?
THE WITNESS: No, sir.

BY MR. GONTRAM:

Q Do you presently have the documents and testimony that are called for by the summonses?
A No, sir.
MR. GONTRAM: Thank you.

[13] CROSS EXAMINATION

BY MR. CUSHNER:

Q Special Agent Olivero, you testified that you had a conversation with me sometime before the returns dated for the third summons, is that correct?
A Yes, sir.
Q You say that conversation took place in the Intelligence Division, your offices in the Intelligence Division?
A I said to the best of my recollection—as I reflect now I believe it took place in your office.
Q Who was present at that conversation?
A Mr. Perry, yourself, another Special Agent and myself.
Q Can you tell the Court why three separate summonses, three separate sets of two summons apiece had been issued to LaSalle National Bank for the same records?
A Yes, sir. The first set of summonses called for years which were not under investigation. The second set of summonses had an incorrect date in the body of the summons and the third set of summonses were issued to perfect those two years.

Q On whose instructions was the first set of summonses issued?

A I issued the summonses.

[14] A I had them prepared.

Q What years did they ask for?

A The years 1970 to 1974, inclusive.

Q 1973 and 1974 were not under investigation, why did you ask for those years?

A Just as a matter of formality.

Q What formality were you complying with?

A To bring the information up to date.

Q You served the summonses in the year 1975, why did you not ask for the records concerning the year 1975?

A I believe the year 1975, for tax purposes, is not completely closed.

Q Do you recall on the occasion upon which you went to the bank to get a return on the first summons, whether or not the bank showed you a letter addressed to the bank that was authored by me?

A I don't recall.

Q Do you recall taking that letter back to your files?

A I might have.

MR. CUSHNER: Will you mark this as Respondent's Exhibit A, please.

(Whereupon, said document was marked as Respondent's Exhibit A for identification.)

[15] BY MR. CUSHNER:

Q I show you what has been marked for identification purposes as Respondent's Exhibit A and ask you if you have ever seen that letter?

A It looks familiar.

Q Will you read that letter to the Court?

A "July 1, 1973. Mr. Ken Marks, Land Trust Department LaSalle National Bank, Room 311, 135 South LaSalle Street, Chicago, Illinois 60603.

"Dear Mr. Marks: We have been retained by Mr. John Gattuso. It is our understanding that LaSalle National Bank has been issued a summons by the Internal Revenue Service requesting that the bank produce for inspection some or all of the records related to John

Gattuso and/or land trusts of which he may be a beneficiary. It is our opinion that such Summons is improper on its face, has been improperly issued and has been issued for improper purpose. In view of the foregoing defects, we instruct the bank to refuse to produce any records or give any testimony pursuant to this Summons and to request that the Internal Revenue Service seek judicial enforcement.

"I understand that this letter will be sufficient to assure such action by the bank and if for any reason anything additional is necessary please notify [16] me immediately.

"Yours very truly."

Q Did I ask him not to turn over the records in order to delay this investigation, or did I ask him not to turn it over because your summons wasn't any good?

A I said that on previous occasion you told me—

Q Just answer my question, Special Agent.

THE COURT: I understand what the letter says, so the witness doesn't have to answer that.

Mr. Cushner, I don't challenge bonafideness of your attack on the summons, don't worry about the remark that was attributed to you which may or may not have been said, it doesn't make a bit of difference anyway. Let's get on with the issue, it is either a valid summons or it isn't.

BY MR. CUSHNER:

Q Would you tell us when you were first assigned to investigate the tax liability of John Gattuso?

A In May of 1975.

Q Who gave you that assignment?

A My supervisor.

Q Who is your supervisor?

A At that time it was Mr. John McDermott.

Q What was the nature of your assignment?

A To investigate the possibility of any criminal [17] violations of the Internal Revenue Code.

Q At the time that you were given the assignment, were you told the source of the assignment?

A I don't quite understand the question.
Q Did it come out of audit?
A No, sir.
Q Did it come out of collection?
A No, sir.
Q Did it come out of an informant?
A In part.
Q What was the name of that informant?
MR. GONTRAM: Objection your Honor, it has no relevancy.
THE COURT: The objection is sustained.

BY MR. CUSHNER:

Q What was the information that had been received from the informant?
THE COURT: I think we have to assume, Mr. Cushner, that whatever else may or may not be true there was an investigation of certain years for the taxpayer being handled by this agent, which was opened prior to the date of this summons. Now how it got started doesn't seem to make a lot of difference.
MR. CUSHNER: I think if we can show the growth of this investigation from other agencies, the criminal [18] purpose of this investigation, grand jury subpoena, a search warrant may have issued, that that would certainly reflect on the propriety of the summons being issued this late in the investigation. Perhaps the frustration of other agents or agencies has turned them to the IRS to issue it hoping the Court will enforce it. That is why we have to get into it. We haven't been allowed to depose this witness, we have to make our case on cross examination.
THE COURT: The identity of the informant may be revealed by the direct question, or it is the nature of the information is what I am saying is not relevant. The rest of this I am not ruling on. If the informant was a grand jury recommendation that is one thing. But if the informant is some person whose confidentiality ought to be respected I would like to respect it. That is the whole purpose of my ruling.

MR. CUSHNER: I can understand, having to do without the name of the informant, but certainly if the information is not the type that would reveal the name of the informant or his identity—
THE COURT: Was this case referred to the IRS, if you know, by some other Federal Investigative Agency?
THE WITNESS: No, the investigation was asked [19] for and initiated by information that I obtained and submitted to the Internal Revenue Service.
THE COURT: This was yours from start to finish?
THE WITNESS: Yes, sir.
THE COURT: You obtained that information in part from an informant?
THE WITNESS: Yes, sir.
THE COURT: And in other parts where did you get it?
THE WITNESS: From another taxpayer.
THE COURT: You mean from a return of another taxpayer?
THE WITNESS: From another investigation, sir.
THE COURT: Go ahead.

BY MR. CUSHNER:

Q This person, this informer who gave you information about Mr. Gattuso, did he volunteer that information or did you ask that informant about Mr. Gattuso?
A The information was volunteered.
Q Prior to that information being volunteered, had you ever heard of Mr. Gattuso?
A Yes, sir.
Q How had you heard of him prior to that information?
A Through the other investigation.
Q Has that investigation been concluded?
[20] A Yes, sir.
Q How did that investigation end?
MR. GONTRAM: I object your Honor that is entirely irrelevant.
THE COURT: The general answer, did this result in a criminal reference, or not?
THE WITNESS: No, sir.

BY MR. CUSHNER:

Q Did it not result in a criminal reference because of the information given concerning Mr. Gattuso?

A No, sir.

Q Had you ever participated in any other investigation directly or indirectly of Mr. Gattuso before this present one?

A No, sir.

Q Have you ever been contacted by the Federal Bureau of Investigation with respect to Mr. Gattuso?

A Yes, sir.

Q On what occasion or occasions were you contacted by the FBI with respect to Mr. Gattuso?

THE COURT: Was this after the beginning of your investigation here or was it one of the factors that precipitated the beginning of your investigation?

THE WITNESS: It goes back to the other investigation, your Honor.

[21] THE COURT: It is complicated.

THE WITNESS: Yes.

THE COURT: All right, so you had a discussion with an agent of the FBI, I assume, concerning Mr. Gattuso during the course of the earlier investigation of the other tax matter?

THE WITNESS: That is correct.

THE COURT: So that at least was knowledge known to you, whatever that discussion was, at the time that you decided to open a file on Mr. Gattuso?

THE WITNESS: Yes, sir.

THE COURT: All right, go ahead.

BY MR. CUSHNER:

Q To the best of your recollection what was the conversation that you had with that FBI Agent, what did he say to you, what did you say to him, who was present and what date did it take place?

MR. GONTRAM: I object, your Honor.

THE COURT: I will sustain the objection.

MR. CUSHNER: On the basis that it is irrelevant, your Honor.

THE COURT: Yes.

BY MR. CUSHNER:

Q Other than the information you received from the informant and the FBI, what other sources of information [22] have you had with respect to this investigation?

A I received some information from the Cosmopolitan National Bank.

THE COURT: Was that as the result of your inquiry?

THE WITNESS: Yes, sir, I served a summons upon the Cosmopolitan Bank and they supplied me with certain records. I received some information from HUD.

THE COURT: Was that as a result of your inquiry?

THE WITNESS: Yes, sir.

THE COURT: Anywhere else?

THE WITNESS: From the office of the United States Attorney. And from another department within the Internal Revenue Service.

THE COURT: Were all of these information that you obtained after you initiated requests—

THE WITNESS: Yes, sir.

BY MR. CUSHNER:

Q And all after the commencement of your opening of the file on this taxpayer?

A Yes, sir.

Q What caused you to contact HUD?

A From information that I have obtained during the course of the investigation indicated that Mr. Gattuso had contacted HUD, so I sought to see why Mr. Gattuso contacted HUD.

[23] Q Where did you receive that information?

A I believe it was in the documents that were with the Cosmopolitan National Bank.

Q What information did you receive from HUD?

A At the present time I believe I only received one document.

Q What is that document?

MR. GONTRAM: Your Honor, I object. There is no relevance to this issue. If counsel is trying to attack the purpose of the summons this does not have any bearing on that.

MR. CUSHNER: It is the type of material that this man is gathering.

THE COURT: Well the bonafideness of the investigation and whether or not it was at that time a focus criminal investigation are the issues here. But I think we have to respect to some extent the information gathering system and the confidentiality that goes with it, and what type of information the Agent's got. I would guess, as an investigating agent, he can chase down every lead in every alley he cares to and some may be relevant and some may not. Some may be important and some may be trivial and some may be embarrassing. I don't think we have to go into all of that. So I will sustain [24] the objection.

MR. CUSHNER: Can I inquire your Honor into the authorship of the documents that he receives, if they were authored by the taxpayer?

THE COURT: The document from the Cosmopolitan, what do you remember about it, was it a letter?

MR. CUSHNER: Your Honor, I have the document he received from the Cosmopolitan, I am concerned about what he received from HUD.

BY MR. CUSHNER:

Q Were they authored by the taxpayer, the document you received from HUD?

A To the best of my recollection it was one document, but as I reflect I believe the document was to HUD from the Cosmopolitan Bank.

Q All right, you said you contacted the U.S. Attorneys' office. Who did you contact at the U.S. Attorneys' office?

A I believe it was a special representative of the Secret Service.

Q Do you recall his name?

A Yes, sir.

Q What is his name?

A John Cozza.

Q What led you to contact John Cozza?

[25] A In the normal course of our investigation we speak to other agents to see whether there are any files and it so happened that Mr. Cozza did have a document relating to John Gattuso.

Q Did you make specific inquiry to Secret Service requesting any information they may have on John Gattuso?

A No, sir.

Q How did you happen upon this file that Mr. Gattuso possessed?

A I believe in general conversation with him.

Q What did the file contain?

A One letter.

Q Was it authored by John Gattuso?

A No, sir.

Q You said you have received other files from other departments of the Internal Revenue Service. What other departments in the Internal Revenue Service provided you with information?

A The Revenue Service office of the Internal Revenue Service, the collection division.

Q The collection division, and who in the collection division did you receive files from?

A Mr. Lieberman.

Q Do you recall Mr. Lieberman's first name?

[26] A I believe it is George Lieberman.

Q Do you recall what office he worked out of?

A Yes, the Northwest Area Office on Kedzie Avenue.

Q What led you to Mr. Lieberman?

A For purposes of control, the Intelligence Division sends to the service center a request of any activity on the taxpayer be held in abeyance pending the result of the Intelligence Division's investigation, and that if there is anything, any action on the taxpayer, we are so notified. I was so notified that there was an outstanding tax liability for Mr. Gattuso, so I contacted Mr. Lieberman.

Q Do you recall for what year that outstanding tax liability was for?

A I believe it was for 1972 and 1973.

Q Is that as a result of an audit that had been previously conducted as to the year 1972?

A I don't think so.

Q Do you recall if the files indicated that a previous audit had been conducted in the year 1972?

A No.

Q Did the files you received from Mr. Lieberman indicate any documents that were authored by John Gattuso?

A Yes, sir.

Q What documents were those?

A Financial statements submitted to Mr. Gattuso [27] in response to his ability to pay the outstanding tax liability. And some cancelled checks—excuse me, I don't know whether they are cancelled or not, some checks.

Q Is the investigation that you are presently conducting with respect to John Gattuso related to any other investigation presently being undertaken by either you or anyone else in the Intelligence Division?

A Not to my knowledge.

Q Is this an investigation that involves anybody other than John Gattuso?

A Not to my knowledge.

Q Have you or any other agent authored any preliminary reports with respect to this investigation?

A I don't understand.

Q Have you authored any preliminary reports with respect to your investigation?

A No investigative reports, no.

Q Do you understand the term, preliminary report?

A Preliminary investigative report, yes, sir.

Q Have you authored one?

A No. sir.

Q Have you authored any final reports with respect to this investigation?

A No, sir.

Q Who is your supervisor at present?

[28] A The supervisor is an acting individual by the name of Chester Romaniak.

Q Spell the last name, if you know it?

A I believe it is R-o-m-a-n-i-a-k.

Q Did he become your supervisor after Mr. McDermott retired from the service?

A He was appointed as an acting supervisor, yes, sir.

Q Has there been any supervisors between Mr. McDermott being your supervisor and Mr. Romaniak becoming your supervisor?

A There could have been one for one day or so, but not for any length of time.

Q Have you ever seen a memorandum, log book, notes, or correspondence, that would indicate whether Mr. Gattuso was electronically or mechanically surveyed at anytime by the Federal Government?

A No, sir.

Q Have you ever mechanically or electronically surveiled Mr. Gattuso?

A No, sir.

Q Did you receive any information from the FBI that the FBI wire tapped Mr. Gattuso?

MR. GONTRAM: Your Honor, I object to this line of questioning. It is irrelevant to the enforcement [29] of the Internal Revenue Service summons.

THE COURT: Well, we are down the path now, I assume this is the last question. You may answer that.

Do you have any information to that effect?

THE WITNESS: No, sir.

BY MR. CUSHNER:

Q Have you discussed any or all of the findings that you have so far with your supervisor?

A Intermittantly I have discussed the progress of the investigation, yes.

Q Did you discuss it with Mr. McDermott?

A Yes, sir.

Q Have you discussed it with Mr. Romaniak?
A Not in detail, no.
Q Did you author memorandums concerning discussions with those gentlemen?
A No, sir.

[30] BY MR. CUSHNER:

Q Now, do you maintain a chronological work sheet?
A No, sir.
Q Have you ever maintained a chronological work sheet?
A Years past, yes, sir.
Q Why do you no longer maintain a chronological work sheet?
A Because we're not compelled to.
Q Do you have a manual handbook and have you read that manual handbook, No. 28?
A Not entirely, no, sir.
Q Are you familiar with the handbook for Special Agents in the Intelligence Division?
A Yes, sir, in part.
Q Is that the handbook offered by the Internal Revenue Service that is directed to the Intelligence Division Agents with respect to how they are to conduct investigations?
A Basically, yes, sir, then supplemented by directives.
Q Do you know whether that book requires you to have a chronological work sheet of your activities?
A I don't have any specific reference, no, sir.
Q Do you recall ever reading that you were supposed [31] keep a chronological work sheet?
A I recall being told the time I was compelled to keep one, but not at this particular time.
Q Do you recall being told that you were to selectively keep a chronological work sheet, or that you were to keep a chronological work sheet?
A Selectively told.
Q Have you ever read the handbook?
A When it's necessary, yes.

Q My question was, have you ever read the handbook?
MR. GONTRAM: Objection, your Honor.
THE COURT: The answer may stand.

BY MR. CUSHNER:

Q If the handbook instructed you to keep a chronological work sheet, would you do so?
A Not if the home ground rules didn't require it, no, sir.
Q What do you mean by "home ground rules", are those published anywhere?
A I take my orders from my immediate superiors and in direct line with the chief of the Intelligence Division. If he so directs that a chrononogical work sheet is not necessary then I'm not compelled to keep one and I won't.
Q Have you been so instructed by the group chief [32] not to keep a chronological work sheet?
A I have not been instructed to keep one.
Q If this book calls for you to keep one would you keep it unless instructed to the contrary?
THE COURT: Mr. Cushner, basically I think you've made your point. The issue is not whether the Agent should have, but whether he did.
Read the section to him, and to me, that says he should and then you can ask him a final question.

BY MR. CUSHNER:

Q Reading from Section 539 of the Internal Revenue Handbook No. 28, Handbook for Special Agents of the Intelligence Division.

> "Chronological work sheets. Special Agents will maintain a chronological work sheet, Form 4365 which requires the recording of sources, dates and other circumstances involved in obtaining of leads and evidence in investigations. Completed Form 4365 for investigation should be maintained as a

permanent part of the district case file. Exhibit 500-15 is an example of the chronological work sheet."

Do you recall ever reading that?

A I might have read it, I don't specifically recall at this time.

THE COURT: Did you keep any such chronological [33] work sheet in connection with the investigation of the tax liability of John Gattuso?

THE WITNESS: No, sir.

BY MR. CUSHNER:

Q Have you, to your knowledge, or any other Federal Agents or employees ever maintained any surveillance on Mr. Gattuso?

A I have not and I don't have any knowledge of any other investigator.

Q In any of the files which you have reviewed which have been provided by other agents, did they indicate that surveillance was ever had on Mr. Gattuso?

A I don't specifically recall that.

Q Have you, on any occasion whatsoever, seen any or all of the documents which are now requested from the LaSalle National Bank?

A I can't recall.

Q Could you have?

A I might have seen part or some indications of the documents.

Q Where might you have seen those?

A Mr. Lieberman's hand.

Q What documents might you have seen that Mr. Lieberman might have shown you?

A He might have shown me the financial statements [34] upon which the identification of the trust in the hands of the LaSalle National Bank was identified.

Q Your summons refers specifically to two specific trust numbers.

A That's correct.

Q Could you tell me how you got those numbers?

MR. GONTRAM: I object, your Honor. We've gone through this testimony before.

THE COURT: I don't recall that, you may answer.

BY THE WITNESS:

A It was on the financial statements submitted by Mr. Gattuso to Mr. Lieberman.

BY MR. CUSHNER:

Q Would you have seen them anywhere else?

A No, sir, not to the best of my recollection.

Q Have you ever ordered, or your yourself caused to have a tract search done?

A I have not, no, sir.

Q Have you checked the land title records?

A In our office, yes, sir. The identity of the land—

THE COURT: The question is what title records did you check. Did you check over the County Building and check the County Land Title Records?

THE WITNESS: I checked the land records for [35] purposes of identifying the real estate and then I checked the land trust files with the Internal Revenue Service.

BY MR. CUSHNER:

Q The Internal Revenue Service maintains land trust files?

A They maintain identity of land trust files submitted to them by the banks.

Q Do all the banks in the City of Chicago extend to the Internal Revenue Service the benefit of names of beneficiaries of land trusts?

MR. GONTRAM: I object, your Honor.

THE COURT: Objection sustained.

Did you find anything in your search of the IRS land trust files relative to this case?

THE WITNESS: Yes, sir. I found the name and identity of the land trust.

BY MR. CUSHNER:

Q How was that provided to the Internal Revenue Service?

A I assume by the bank.

MR. CUSHNER: Your Honor, I'd like to go into how exactly the IRS receives these records.

These records, under Illinois Law, are confidential. Land trust documents provide that they should not be [36] disclosed and I think we should have a right to inquire how the IRS, if this agent knows, how the IRS acquired these records.

THE COURT: Tell me first how it's relevant?

MR. CUSHNER: I think it's possible that these agents may have obtained this information from friendly officers of the bank and the summons would be invalid and not be enforced by the Court if this is true.

THE COURT: I don't agree with that. Seeing something under any circumstances is far different from a summons requiring its production and official disclosure. I don't think that's even an appropriate area of inquiry.

MR. CUSHNER: I think Powell v. United States, the Supreme Court case, has established the fact that if the information is already within the hands of the Internal Revenue Service it's not proper inquiry for the summons. Okay, I'll go on.

BY MR. CUSHNER:

Q Do you maintain memoranda of all interviews and meetings you conduct or attend with respect to these investigations?

A Correct, sir.

Q What particular violations of the IRS Code are you investigating with respect to Mr. Gattuso?

[37] A Investigation just to determine whether there is any violation.

Q At the present time you don't have any idea as to what section of the Code you might be looking at.

Are you trying to make a net worth case, specific item case, filing of false returns, filing of false statements, any conception of what you're looking for?

A Looking to see if there are any violations of the Internal Revenue Code.

Q With the informal testimony of the FBI records and the internal records of the IRS and the interviews then

you still have no idea what you're looking for, you still have not decided what violations may or may not have occurred?

A Did you ask me?

Q Is that correct?

A Well, sir, I'm attempting to determine whether or not there are any criminal violations of the IRS.

Q You mentioned that you had received from Mr. Lieberman a statement of financial condition authored by Mr. Gattuso.

Isn't it a fact that part of your investigation is trying to determine whether Mr. Gattuso perjured himself on that document?

A I have not looked into that matter at this time.

Q Have you considered that matter?

[38] A No, but I will.

Q Is the reason you haven't considered it, an agent with 16 years experience—you receive a financial statement and you didn't consider whether or not he may have perjured himself on it?

A Sure, I can't make judgment until I have all the facts.

Q And to gather the facts you must have some idea of which way the investigation is going, otherwise how do you know which facts to look for?

A The leads which we have developed based upon the information received will tell me whether or not Mr. Gattuso in fact did violate any criminal section of the Code.

Q Isn't it true that your own manual of procedures suggests that you try to focus in and find out what violations have occurred so that you don't go haphazardly around looking for information, but have a focus and direction of investigation.

Do you recall reading that in your manual?

A Absolutely.

Q Is there a Revenue Officer working with you in conjunction on this case?

A No, sir.

Q Is there a Revenue Agent with you working on [39] this case in conjunction with this case?

A No, sir, not at this time.

Q Do you recall having a meeting with myself, Mr. Perry, Special Agent Wilmonski and yourself in our office on July 11, 1975, I believe it was a Friday?

A I have a recollection, yes, sir.

MR. CUSHNER: Would you mark this as Respondent's Exhibit B.

(Whereupon, said document was marked as Respondent's Exhibit B for identification.)

BY MR. CUSHNER:

Q I show you what has been marked as Respondent's Exhibit B for identification, and ask you if you recognize this document?

A It looks familiar, yes, sir.

Q When did you see it?

A I think I saw this yesterday.

Q How did you happen to see it?

A It was handed to me.

Q By whom?

A I believe our group secretary.

Q Is she over the age of 18?

A Yes, sir.

Q Does she have any interest in this litigation?

[40] A No, sir.

Q Is this a subpoena duces tecum commanding you to be in this courtroom and to bring with you all investigative files, all memorandum, all correspondence and all other material that relate or concern John Gattuso?

A Yes, sir.

Q Did you bring those documents with you?

A Yes, sir.

Q Where are they?

A In my briefcase.

Q To your knowledge has a search warrant ever been issued in furtherance of any Federal investigation with respect to John Gattuso?

A Not to my knowledge.

Q To your knowledge has there been any postal surveillance of the taxpayer or any parties related to the taxpayer?

A Not to my knowledge.

MR. CUSHNER: I have no further cross examination of this witness.

I would like to move into evidence Respondent's Exhibit B and Respondent's Exhibit A into evidence at this time.

THE COURT: A and B may be admitted.

[41] (Whereupon, Respondent's Exhibits A and B previously marked for identification were received in evidence.)

THE COURT: Do you have any questions by way of clarification? I guess we call this cross examinations and your questions clarify questions.

Do you have anything, counsel?

MR. GONTRAM: No, I do not.

THE COURT: You're excused, sir.

(Witness excused.)

MR. GONTRAM: Your Honor, I would like to move into evidence Government's Exhibits 1 and 2.

THE COURT: They're attached to the petition. In any event, they may be admitted.

(Whereupon, Government's Exhibit Nos. 1 and 2 previously marked for identification were received in evidence.)

THE COURT: Do you have any other witnesses?

MR. CUSHNER: I'm not putting on the Government's case.

THE COURT: I'm sorry, I keep shifting the burden of proof unwittingly.

Do you have any other witnesses?

MR. GONTRAM: No.

THE COURT: Do you have anything you would like [42] to put on?

MR. CUSHNER: Yes, I'd like to call to the stand Special Agent Olivero.

JOHN F. OLIVERO,

called as a witness by and on behalf of the Respondent herein, having been previously duly sworn, was examined and testified further as follows:

THE COURT: Do you understand, Mr. Olivero, that you continue to testify under oath?

THE WITNESS: Yes.

THE COURT: Go ahead, Mr. Cushner.

DIRECT EXAMINATION

BY MR. CUSHNER:

Q Mr. Olivero, pursuant to subpoena served upon you today you brought all the files and records we've asked you to bring and they're in your briefcase.

May we have them at this time?

MR. GONTRAM: Your Honor, the Government objects to the production of those documents. This is the exact precise documents called for in the same subpoena served upon Mr. Olivero where the Government objected to the production of documents and the Government continues to object to this discovery technique in a proceeding of this sort.

It's clear in this Circuit, as well as virtually [43] every other circuit in this country, that documents in discovery of this nature is only permitted after the hearing that we are holding today and only if the respondent is able to raise a substantial question concerning the validity of the summons. The Government submits that no question has been raised at this point concerning the validity of this summons.

MR. CUSHNER: Your Honor, I believe the cases to which counsel would refer to, which I believe only exist in three circuits, refer only to the deposition discovery.

We served Special Agent Olivero with a trial subpoena. I don't think there's any case that I've been able to discover that would deprive a respondent of being able to serve a trial subpoena on a witness.

MR. GONTRAM: I believe that United States v. Turner, a case in this Circuit, does speak to that question, or at least the facts are similar to that question.

In any event, this attempt to subvert the holding of the Circuit Court in this case would be clearly improper and it's essentially the exact same thing.

THE COURT: I think the logic which compells the Court's discretion in discovery is equally compelling in instances of the trial.

[44] Unless you have sustained the burden, or reached the threshold of proof after the presentation of your case that suggests that the records should be gone into, at which time I would take them in for an in camera inspection and decide where we went from there. But, on the evidence that you put in, or that we've heard thus far, I haven't heard any such showing.

Do you have any other evidence, Mr. Cushner?

MR. CUSHNER: Yes, I think we'll excuse Agent Olivero and I'd like to call Mr. Gregory Perry.

GREGORY J. PERRY,

called as a witness by and on behalf of the Respondent herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CUSHNER:

Q Would you give us your name for the record.

A Gregory Perry.

Q Could you tell me what your occupation is, Mr. Perry?

A I'm an attorney.

Q Where are you employed?

A The firm of Pederson & Houpt.

Q Do you have an area of specialization?

A I specialize in primarily Federal taxes.

[45] Q Calling your attention to June 11, 1975, do you recall attending a meeting with John Olivero?

A Yes, I do.

Q If John Olivero was in the courtroom could you identify him?

A Yes.

MR. CUSHNER: Let the record show that the witness has pointed out Special Agent Olivero, who earlier testified.

THE COURT: The record may so reflect.

BY MR. CUSHNER:

Q Calling your attention to that meeting of June 11, 1975, could you tell me who was present at that meeting?

A John Olivero, another agent, Special Agent Wilmonski, yourself and myself were there.

Q Do you recall what the subject matter of that meeting was?

A The subject matter was an investigation being conducted by Mr. Olivero regarding Mr. Gattuso.

Q Why were you present at the meeting?

A Our firm was retained by Mr. Gattuso to represent him in this investigation.

Q To the best of your recollection what, if anything, did you say or did they say to you?

A At the meeting we discussed the nature of the [46] investigation, which Mr. Olivero was conducting at the time, and I asked him what civil aspect of the investigation he was getting into and he said his investigation was strictly related to criminal violations of the Internal Revenue Code. I also discussed with him the nature of these criminal violations and at the time he was unwilling to disclose them; and I also asked him if there was a joint investigation and whether there was any Revenue Agent or officer assigned to the case with him and he said no, strictly a criminal investigation. That basically concluded our meeting at that time.

Q Does that exhaust your recollection of that meeting?

A Basically, yes.

MR. CUSHNER: I have no other questions of the witness.

THE COURT: Any cross, counsel?

MR. GONTRAM: Yes, your Honor.

CROSS EXAMINATION

BY MR. GONTRAM:

Q Mr. Perry, your firm represents Mr. Gattuso, is that correct?

A That's correct.

Q You also represent LaSalle National Bank?

A That's correct.

[47] Q In this proceeding?

A That's correct.

Q Do you see any conflict of interest in that situation?

MR. CUSHNER: Objection, your Honor.

THE COURT: If there is and I don't see it at this moment, this isn't the time to go into it. It's not relevant to this issue.

Go ahead.

BY MR. GONTRAM:

Q Is there an individual in your firm by the name of Sheldon Dickenson?

A No, sir.

Q Is there an individual in your firm by the name of Sheldon Davidson?

A Yes, sir.

Q Have you discussed this case with him?

A Certainly, the procedural aspects of it.

Q You have not discussed any substantive matters concerning this case with Mr. Davidson?

A No, we don't know what the substantive matters are.

Q Well, you have discussed the case then?

A Yes.

Q Are you aware of Mr. Davidson's former position [48] before he became a member of your firm?

A Yes, I am.

Q What was that?

A He was chief of the Chicago Strike Force.

Q And did Mr. Davidson—was Mr. Davidson involved in any way with Mr. Gattuso while he was a member of the Strike Force?

A I have never discussed that. He may have been.

Q He has never stated that to you that he was?

A No. At the time we decided to represent Mr. Gattuso we did contact the present U.S. Attorney as to whether there would be any problem because Mr. Davidson is a member of our firm, and we asked for—we wrote a letter to him and we got a response from the U.S. Attorney that said there would be no problem.

MR. GONTRAM: I have no further questions.

MR. CUSHNER: I have some redirect, your Honor.

Would you mark this as Respondent's Exhibit C for identification.

(Whereupon, said document was marked as Respondent's Exhibit C for identification.)

REDIRECT EXAMINATION

BY MR. CUSHNER:

Q Mr. Perry, do you recall what position Mr. [49] Davidson held while he was employed by the Department of Justice?

A I believe he was chief of the strike force.

Q I show you what has been marked as Respondent's Exhibit C, and ask you if you've ever seen that before?

A Yes, I have.

Q Would you identify Respondent's Exhibit C for us, please?

A It's a letter dated June 25, 1975 from Mr. Peter Vira, who succeeded Mr. Davidson in that position.

Q Could you read the letter to us, please?

MR. GONTRAM: I object.

MR. CUSHNER: Your Honor, he raised the issue that there is a possible conflict of interest and Mr. Davidson is employed by our firm, and I think it's only fair that we get into the correspondence between our firm and the Department of Justice.

THE COURT: I assume that the correspondence puts the question to rest and I hereby make a finding that there's no conflict of interest in this case.

Let's go on to something else.

MR. CUSHNER: I have no further questions of the witness.

THE COURT: Anything else, counsel?

MR. GONTRAM: No, your Honor.

[50] THE COURT: You're excused, sir.

(Witness excused.)

THE COURT: Is there anything else, Mr. Cushner?

MR. CUSHNER: No, I have no further witnesses.

THE COURT: Do you have anything by way of rebuttal?

MR. GONTRAM: No.

THE COURT: It's rather late, but I'd like to hear very briefly the argument on either side.

Tell me why you think I should enforce this summons, and I'll rehear Mr. Cushner in response. The matter has been uncluttered and uncomplicated and therefore the argument need not be long.

MR. CUSHNER: I think there's an initial argument as to whether or not sufficient evidence has been adduced which would allow us to depose the agent. If we're getting into the facts as to whether or not the summons should be enforced, the respondent would very much like to file briefs on the subject.

THE COURT: You're right, this hearing grew out of the long controversy over whether Mr. Olivero should be deposed and whether you could make some threshhold showing.

MR. CUSHNER: I think that could be occupied.

THE COURT: All right. We can handle that issue briefly in any event.

[51] MR. CUSHNER: We would like to file briefs as to the remaining issue. We'd like to be able to file a brief with respect to the issue.

THE COURT: Let's dispose of the issue of whether Agent Olivero should be submitted to deposition, which he virtually did a few minutes ago.

MR. GONTRAM: That's correct, and it's the Government's position that Agent Olivero was on the stand for a substantial period of time and that to allow his deposition at this point to be taken would simply be to delay the proceeding, which could serve no purpose for respondent to argue that he's being denied any privilege that he would otherwise be entitled to, I submit is not and would not be consistent with what has gone on in this hearing today.

Substantial cross examination has been conducted and no questions, really, have been raised. Certainly when a man, when counsel seeks to investigate and to inquire into the details of an investigation, certainly there may be individual items that he would say well, I want to look into that, that may disclose something or I want to look into this context, that may disclose something. But, the test, as the Courts have set forth, and I refer specifically to the case United States v. Turner in the Seventh Circuit and the United States v. National State Bank in the Seventh Circuit, the question is whether or [52] not a substantial question has been raised.

In the Turner case there was an introduction into evidence of a remark having been made to the taxpayer that was under investigation. That remark was to the effect that if we get any—that the Government would try to indict the taxpayer if the summons turned up any indication of illegal activities. The Court stated that this remark fell short of indicating that the Government's only purpose was to obtain evidence against him for use in a criminal proceeding.

Of course, that is the question, whether the summons has only the single purpose for us in a criminal proceeding, or whether there is any possibility of a civil aspect to the summons.

Agent Olivero testified that there was a civil purpose, that he has not even computed any tax liability and on cross examination this was made abundantly clear that this investigation is no where near being concluded.

Certainly on the direct and cross examination of Agent Olivero it's clear that the information sought by the summons does have a civil purpose, that does relate to

a civil tax liability of the taxpayer and that Agent Olivero is trying to ascertain whether certain income was correctly reported, whether those amounts are correctly reported and that he must obtain testimony and the documents [53] from the LaSalle National Bank to make that determination and calculation; and that nothing he has said, notwithstanding the attempt to engage in a discovery through the entire investigation, nothing he has said is to take away from the fact.

THE COURT: Mr. Cushner, any response?

MR. CUSHNER: I think counsel has hit upon some issues that may go to the final issue as to whether the issue before the Court right now is whether or not a question, enough of a question exists to allow us to inquire in the deposition of the agent what the purpose and nature of the investigation is and whether or not the Court should examine in camera the files of the IRS.

I did spot the characterization given by opposing counsel, I never, during either direct or cross examination, ever heard the word civil ever used by Agent Olivero. I believe the only thing Agent Olivero testified as being confused to is as to which particular criminal sanction he intended to investigate and finally recommended against our client.

I think it's quite clear that the only thrust of this investigation is criminal and I think we should have a right to go into the records of the Internal Revenue Service, at least those which the Court would find proper to disclose to us, and I think we have a right to further [54] develop this theory and I think it's been adequately established, certainly on direct if not on cross examination, that the sole purpose of this investigation is a criminal one. No where has it been established that Agent Olivero has any intent, any purpose, any design, any plan to attempt to find any civil violation whatsoever as against the taxpayer here involved.

In view of that, I respectfully request that we be given the right to examine Mr. Olivero in deposition and that the Court examine in camera the records of the Internal Revenue Service.

THE COURT: To finish your syllogism, Mr. Cushner, assume that the records reflect that the Olivero investigation is criminally based, and I am in agreement with you that he didn't say anything in his testimony about civil tax liability, what are the consequences of that? Are they inevitable in your mind?

MR. CUSHNER: I think it's inevitable. I think all the cases, especially the most recent cases, that the language of issued in good faith and to determine the civil tax liability is the burden that the Government must carry if there to ask the Court to use its process to enforce the summons.

The purpose of issuing a summons is to determine the civil tax liability and in every other case I have [55] ever seen in which the agents submits an affidavit to the Court he refers to civil tax liability. No where in the affidavit of Agent Olivero, which has been submitted, although it wasn't introduced in the testimony—it's part of the record as being attached to his petition—he doesn't refer to a civil tax liability, he refers to the tax liability and he doesn't do anything but state on the stand that he's running a criminal investigation.

I think it's clear under Donaldson that it's possible for the Internal Revenue Service to issue summons in good faith and for the purpose of determining civil tax liability if a special Agent is running criminal investigations. When they come in here and seek the enforcement of the summons, there's a joint investigation, there's a Special Agent working with a Revenue Agent, the purpose of which is to divide and distinguish between the various duties. I don't think the Turner case has said anything different. I think even if a Revenue Officer finds anything criminal he'll ask for a Special Agent and if they find anything they'll ask for an indictment.

The Special Agent has testified without qualification that this is a criminal investigation and this is precisely what a summons may not be issued for. The question goes to whether the Court is being asked to abuse its process to [56] enforce this summons. This summons is not to determine his civil liability nor has it been issued in good faith.

THE COURT: I'd like to hear your response on that issue. Really the case isn't so complicated that we have to bifurcate it into several trials. What's your answer to that? Do you agree with the legal conclusions of Mr. Cushner that if I were to make a finding that this was ab initio or forever a criminal investigation, that this summons would be unenforceable?

[57] MR. GONTRAM: Absolutely not. The law is that if there is no civil purpose to the summons that the summons would be invalid. Not that there is a criminal purpose to it, because obviously when any special agent issues a summons there is a criminal purpose to that summons.

The Supreme Court specifically stated in Donaldson that they would not draw a line when a special agent enters a case. Mr. Cushner would have the Court rule that simply because a special agent is in this case and has issued a summons that this summons is invalid.

Certainly the Government admits that this is an investigation that has possible criminal implications there is no doubt about that; and there is no doubt that the Supreme Court was aware of that fact in Donaldson.

In United States v. Awerkamp, a 7th Circuit case cited at 497 F 2d. 832, the Court addressed this issue and that is criminal purpose. Quoting from Donaldson, the Court states at page 834:

> "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct up until the point where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution."

The Court then said:

[58] "This point is reached when a recommendation for criminal prosecution is made." It's clear that that point has not been reached in this case.

Furthermore, the mere fact that there is no revenue agent in this case does not affect or in any way change the result reached by the 7th Circuit in Awerkamp or the Supreme Court in Donaldson.

THE COURT: Were there revenue agents in those two cases—if you remember the facts well enough.

MR. GONTRAM: It's not—I would think that there was a revenue agent.

MR. CUSHNER: Awerkamp was a pro se petition and the case is United States of America and L.J. Marberry Revenue Agent, not special agent.

MR. GONTRAM: So it's clear that there was in Awerkamp—I could not state for certain in Donaldson if there was or wasn't—but I would even contend that there was a revenue agent.

I would cite the Court a case, United States v Fisher, cited at 500 F 2d. 583, which the Court clearly stated in its recitation of facts that it was only a special agent involved in that case. Again, the Court in its conclusion is holding that there was no—that this in and of itself did not affect the validity of the summons [59] and states:

> "If we were to accept taxpayer's argument we would be drawing a line where a special agent appears, a line which the Court in Donaldson expressly refused to draw. Both in DeGrosa and Erdner we refused to hold that such evidence, in itself, satisfied the taxpayer's burden of proof. We reaffirm those holdings today."

Those holdings and the holdings of the Supreme Court both are based on the fact that a special agent, while he is investigating a case, that is up until the case is closed and a recommendation for criminal prosecution is made, has several options. He can recommend that criminal prosecution be made, but he also can recommend for civil liability, if that is all the evidence discloses.

So it's clear that this investigation is not ended and it's also clear that an investigation, that a summons may be issued where the primary purpose of that summons is to further a criminal—to obtain evidence in a criminal prosecution.

It has been held by the 6th Circuit in United States v Held—and again the primary focus is whether or not there is a civil—any civil purpose to the [60] summons and not whether there is any criminal purpose.

THE COURT: Isn't it true that any criminal investigation—that in any criminal investigation there's always a probability of civil tax liability and therefore under your theory any criminal investigation would not really be one until they closed it because there was always a possibility of a civil liability.

MR. GONTRAM: Until there is a recommendation for criminal prosecution, that is correct.

THE COURT: That's the position that you take. But until Agent Olivero makes his recommendation we don't know whether this was a totally criminal case because there might have been civil liability discovered.

MR. GONTRAM: That is correct, your Honor.

THE COURT: Gentlemen, let say that first that I'll decline to order the submission to deposition by Agent Olivero.

I'd also like to see, for in camera inspection, the investigative file he brought to Court in response to the taxpayer subpoena.

Now, if you gentlemen would submit to me—and I don't need elaborate briefs—a list of the authorities used in your argument I'll rule on the motion to enforce.

[61] As I said, it doesn't seem to warrant making any more production out of it than that. You'll submit the file to me for in camera inspection and I will then bundle it up in such a way to preserve it for the Court of Appeals for whichever side wants to use it, or make some arrangements to do so.

Based on the case authorities cited to me, which cases I'll read, I'll decide the petition for the enforcement of the Internal Revenue summons based on the finding I make as to whether this was a manifestly and exclusively criminal investigation or whether it has a civil purpose.

MR. CUSHNER: We would only like time in order to have a transcript available to the Court. We ordered it and we will require it in any event. I think that is important because of the nature of at least part of the brief we will submit to your Honor, and I think it's important to indicate that the Government's case went in as evidence and I would like to have that available to the Court.

THE COURT: I'll say now that I heard nothing in Agent Olivero's testimony to suggest that the thought of a civil investigation ever crossed his mind.

There may be something, however, in his [62] notes, reports, memoranda, etc., or it may be that it doesn't make any reference of whether he thought of it. But as long as there was a possibility that information regarding civil tax liability might come up, that it was a civil investigation until he closed it.

If that's the law, you're in trouble, Mr. Cushner.

MR. CUSHNER: I agree with you. I think though that your Honor hit the nail on the head. It would be impossible to have a criminal indictment come out with respect to an income tax violation if there wasn't a penalty or tax due.

THE COURT: I accede to your suggestion, and it's a reasonable one, that you be allowed to look at the transcript and write a brief memorandum.

Let's assume you've heard all from Agent Olivero by way of discovery you're going to hear, and I think you've got virtually everything you're going to get from a deposition in any event; and therefore I would not order his submission to deposition and I'll undertake the in camera inspection at the same time that you file memos on it.

How much time do you gentlemen need to file a brief memorandum? You understand that on the issues I [63] have your positions clearly stated.

Now, unless I find something in the in camera inspection that gives more support to the Government position than the Agent's testimony did, it would be my conclusion that he was at all times involved in a criminal investigation, at least in his own mind. If you're right, that doesn't make any difference because he didn't close it out yet. If you're wrong then you're going to lose.

I think it boils down to an issue of law so it's the cases really that I'm interested in plus any further clues I may find in the in camera inspection of the investigative file.

What were you going to suggest, Mr. Cushner, on the time?

MR. CUSHNER: I assume the Government will be filing first brief. As long as the transcript is available to me I would be happy to reply to the Government's brief within ten days of its submission to me.

THE COURT: How about together?

MR. GONTRAM: Why not.

THE COURT: Could we have a simultaneous brief in ten days?

MR. GONTRAM: Fine.

THE COURT: I'll give you a little more time if you need it.

[64] Now, let me see where ten days brings us to—let's make it December 17th, that's the middle of the week before Christmas and that will give you a little more time. I'll receive the briefs by that time; you'll have your transcript.

In the meantime will you make some arrangements to have the Agent leave his investigative file with the Clerk and I'll look at that.

Thank you gentlemen, good night.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

[65] IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

UNITED STATES OF AMERICA AND JOHN F. OLIVERO,
SPECIAL AGENT, INTERNAL REVENUE SERVICE,
PETITIONERS,

v.

LASALLE NATIONAL BANK AND JOSEPH W. LANG,
VICE-PRESIDENT, LASALLE NATIONAL BANK,
RESPONDENTS.

CERTIFICATE

I HEREBY CERTIFY that the proceedings had in the above-entitled cause before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on December 5, 1975, were caused to be reported in shorthand by me; and the foregoing transcript, consisting of Pages 1 to 64, inclusive, is true and correct.

ANTHONY W. LISANTI,
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

[Received Dec. 29, 1975, H. STUART CUNNINGHAM, Clerk,
United States District Court]

UNITED STATES OF AMERICA AND JOHN F. OLIVERO,
SPECIAL AGENT, INTERNAL REVENUE SERVICE,
PETITIONERS,

v.

LASALLE NATIONAL BANK AND JOSEPH W. LANG,
VICE-PRESIDENT, LASALLE NATIONAL BANK,
RESPONDENTS.

MEMORANDUM OF PETITIONERS

This proceeding was commenced by petitioners to judicially enforce two Internal Revenue summonses served upon the respondent, LaSalle National Bank. On December 5, 1975, a hearing was held on the Court's order to show cause why the respondent should not be compelled to obey the summonses, on the petitioners' motion for a protective order and motion to quash subpoena served upon petitioner, Special Agent John F. Olivero, and on the respondent's motion to dismiss. The Court ruled that Special Agent Olivero need not submit to deposition (Transcript ("Tr.") 62), but that it would inspect Agent Olivero's files "*in camera*" (Tr. 62), and denied respondent's motion to dismiss. (Tr. 4.) Two witnesses, Special Agent Olivero and Gregory Perry, appeared and testified at the aforesaid hearing. The testimony disclosed that the investigation by Special Agent Olivero concerning the possible tax liabilities of John Gattuso has not been completed (Tr. 11), that neither a "preliminary investigative report" (Tr. 27), nor a recommendation for criminal prosecution (Tr. 11-12), has been

made with respect to the investigation of John Gattuso, and that Special Agent Olivero has not determined in his own mind as to whether or not to recommend criminal prosecution in this case. (Tr. 12.) The purpose of the investigation was variously characterized by Special Agent Olivero as involving a determination of the tax liabilities of John Gattuso for the years under investigation (Tr. 6), and "to see if there are any violations of the Internal Revenue Code." (Tr. 37.) In keeping with Agent Olivero's duties as a Special Agent of the Intelligence Division of the Internal Revenue Service, the focus of his investigation was to "investigate the possibility of criminal violations of the Internal Revenue Code." (Tr. 6, 16-17, 37, 46.) Finally, one of the purposes of issuing the summonses to LaSalle National Bank was to check the accuracy of rental income reported by the taxpayer on properties held by LaSalle National Bank as trustee. (Tr. 7.)

DISCUSSION

It is clear that an Internal Revenue summons is enforceable if it is issued under circumstances where criminal indictment and prosecution are possibilities. *Donaldson* v. *United States*, 400 U.S. 517 (1971). A summons is also enforceable (i.e., it is issued for a proper purpose) notwithstanding that it is issued "principally to investigate for criminal liability," *United States* v. *Michigan Bell Tel. Co.*, 415 F. 2d 1284 (C.A. 6, 1969), or for the primary purpose of furthering a criminal tax investigation. *United States* v. *Held*, 435 F. 2d 1361 (C.A. 6, 1970). Accordingly, in order to sustain a defense that enforcement of the summons would be an abuse of the court's process, *United States* v. *Powell*, 379 U.S. 48, 58 (1964), the burden is upon the respondent to prove that there is no civil purpose to the summons. *United States* v. *Bell*, 448 F. 2d 40 (C.A. 9, 1971); *United States* v. *Moriarty*, 435 F. 2d 347, 349 (C.A. 7, 1970); *United States* v. *DeGrosa*, 405 F. 2d 926 (C.A. 3, 1969), *cert. denied sub nom.*, *Zudick* v. *United States*, 394 U.S. 973 (1969); *United States* v. *Michigan Bell Tel. Co.*, *supra*

at 1286; *Donaldson* v. *United States*, *supra* at 527 (burden of proof); *United States* v. *Powell*, *supra* at 58 (burden of proof); *United States* v. *Erdner*, 422 F. 2d 835, 836 (C.A. 5, 1970) (burden of proof).

It is submitted that the respondent has clearly failed to meet its burden of proving that enforcement of the summonses in question would constitute an abuse of the court's process. The evidence demonstrates that the purpose of the current investigation is to determine the tax liabilities of John Gattuso for the years 1970, 1971 and 1972. The investigation is not itself limited to a determination of possible criminal violations, although such is the focus of the investigation by Special Agent Olivero. However, it is quite clear that this "focus" does not affect the validity of the summonses. As stated by the Supreme Court in *Donaldson* v. *United States*, *supra* at 535-36:

> To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law.

The only evidence presented at the hearing in this case relating to a "criminal purpose" of the summonses was Agent Olivero's testimony (and his admission to Gregory Perry) concerning his duty to investigate possible criminal violations of the Internal Revenue Code. Not only is such evidence insufficient to establish the *sole* purpose of the summonses, but to hold the summonses unenforceable on this ground would be to "draw a line" upon the appearance of a special agent, a holding rejected by the court in *Donaldson*. Moreover, it is submitted that a valid civil purpose was affirmatively demonstrated by Special Agent Olivero's testimony that the summonses were issued to determine the correctness of rental income, reported by the taxpayer, on property held in trust by the respondent. Clearly, the correctness of such income has civil, and possibly criminal, ramifications. Agent Olivero's investigation of the taxpayer has not yet been completed and no recommendation for criminal prosecution has yet

been made. Even if the documents and testimony called for by the present summonses, plus any other data, fail to disclose criminal liability, such evidence would clearly be relevant to John Gattuso's civil tax liability. On the other hand, should a recommendation for criminal prosecution ultimately be made, the information called for by the summonses would still be relevant to a determination of John Gattuso's liability for civil tax fraud. As stated by the Court in *Boren* v. *Tucker*, 239 F. 2d 767, 772 (C.A. 9, 1956), a case involving the enforceability of a summons issued by a special agent:

> . . . the existence of the *possibility* of criminal prosecution does not necessarily mean that there *will* be criminal prosecution. The ultimate decision may be, (1) civil liability for the correct tax, (2) liability for the tax plus penalty, (3) criminal prosecution, or (4) both the penalty and the criminal prosecution.

The petitioners sought to introduce into evidence the possible results of an investigation by a special agent as noted by the court in *Boren* v. *Tucker*, *supra*. (Tr. 11.) Notwithstanding, petitioners submit that the Court may take judicial notice of the duties and responsibilities of John Olivero, as a special agent of the Internal Revenue Service, Intelligence Division. *United States* v. *Mercurio*, 418 F. 2d 1213, 1216 (C.A. 5, 1969), *aff'd sub nom.*, *Donaldson* v. *United States*, *supra*. Such duties and responsibilities are outlined in two recent decisions by the Seventh Circuit Court of Appeals. *United States* v. *Moriarty*, 435 F. 2d 347 (C.A. 7, 1970); *United States* v. *National State Bank*, 454 F. 2d 1249 (C.A. 7, 1972).

Although both cases involved joint investigation (i.e., a Revenue Agent from the Audit Division of the Internal Revenue Service and a Special Agent), the Court noted that the responsibilities of the special agent included "certain 'audit functions'." "[A]n audit of the tax liability would necessarily precede a recommendation by [the special agent] of criminal prosecution." *United States* v. *National State Bank*, *supra* at 1251. Furthermore, the special agent may recommend "that civil penalties for fraud be imposed without criminal prosecution, as the

facts warrant; [and] that the cooperating Revenue Agent is bound by the recommendations of the Special Agent with respect to civil fraud penalties." *United States* v. *Moriarty*, *supra* at 349.

In addition, respondent's counsel, at the hearing held in this matter, read Section 539 of the Handbook for Special Agents, Intelligence Division, Internal Revenue Manual Chapter 9900, (Tr. 32), in cross-examining Agent Olivero. The Court is respectfully referred to Section 536 of that document which states that in cases in which prosecution is not recommended, the special agent is responsible for recommendations concerning civil penalties.

The respondent may argue herein that in the investigation of John Gattuso a Revenue Agent has not been assigned to the case, and therefore, since only a Special Agent is presently conducting the investigation, the validity of the summonses is affected. It is clear, however, that case law does not lend any support for such an argument. Thus, *Donaldson* v. *United States*, *supra*, which enforced a special agent's summons served, as here, upon a third party witness, does not distinguish between a joint investigation and one conducted solely by a special agent. In *United States* v. *Fisher*, 500 F. 2d 683 (C.A. 3, 1974), however, it is clearly set out in the court's opinion that only the special agent was conducting the investigation and that no employee of the Audit Division of the Internal Revenue Service was participating therein. The court upheld the validity of the summons, stating that "[i]f we were to accept taxpayers' argument we would be drawing a line where a special agent appears, a line which the Court in *Donaldson* expressly refused to draw." 500 F. 2d at 688.

Finally, it is significant that in the present case no recommendation for criminal prosecution has yet been made. In discussing the importance of this fact on the issue of "improper purpose", the Seventh Circuit stated in *United States* v. *Awerkamp*, 497 F. 2d 832, 834-835 (C.A. 7, 1974):

> Respondent argues that the summons is being used for an improper purpose because the information being sought will be sued to recommend a criminal

> prosecution for a violation of 26 U.S.C. § 7203. In *Donaldson* v. *United States*, 400 U.S. 517, 91 S. Ct. 534, 27 L. Ed. 2d 580 (1971), the Supreme Court held that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct" up until the point "where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution . . ." This point is reached when a recommendation for criminal prosecution is made. 400 U.S. at 531-536. *Accord*, *United States* v. *Moriarity*, 7 Cir., 435 F. 2d 347, 349-350. There is not the merest suspicion in the record that a recommendation for prosecution had been made. The existence of a possibility of criminal prosecution does not make the summons unenforceable. *See United States* v. *Turner*, 480 F. 2d 272, 275 (7th Cir. 1973). [Footnotes omitted.]

In the present case, no recommendation for criminal prosecution has been made and respondent has clearly failed to meet its burden of establishing that enforcing the summonses would constitute an abuse of the Court's process.

CONCLUSION

For the foregoing reasons, the petition filed herein to enforce Internal Revenue summonses should be granted.

SAMUEL K. SKINNER
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 1975, a copy of the foregoing memorandum of petitioners was mailed, postage prepaid, to Matt P. Cushner, 180 North LaSalle Street, Suite 3400, Chicago, Illinois.

JOSEPH M. GONTRAM
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

[Received Dec. 24, 9:45 AM '75, United States Attorney, Northern District, Chicago, Illinois]

UNITED STATES OF AMERICA AND JOHN F. OLIVERO, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS,

v.

LASALLE NATIONAL BANK AND JOSEPH W. LANG, VICE-PRESIDENT, LASALLE NATIONAL BANK, RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO ENFORCEMENT OF INTERNAL REVENUE SERVICE SUMMONS

On December 5, 1975 a hearing was held in the cause herein to determine whether the Summonses issued by Special Agent Olivero should be enforced. Following the hearing and the taking of evidence therein, the Court ordered the Petitioners and Respondents to file simultaneous briefs with respect to the question of whether a Summons issued by the Internal Revenue Service for the sole purpose of conducting a criminal investigation may be properly enforced by a District Court.

The transcript of the December 5, 1975 hearing contained several crucial pieces of testimony. During the direct examination of Special Agent Olivero by Mr. Gontram, the attorney for the Government, the following exchange took place.

Q. Mr. Olivero, would you describe your focus as a Special Agent in this investigation?

A. To investigate the possibility of criminal violations of the Internal Revenue Code. (Transcript, p. 6) [1]

During the cross-examination of Special Agent Olivero by Mr. Cushner, attorney for the Respondents, the following exchanges took place:

Q. Would you tell us when you were first assigned to investigate the tax liability of John Gattuso?
A. In May of 1975.
Q. Who gave you that assignment?
A. My supervisor.
Q. Who is your supervisor?
A. At that time it was Mr. John McDermott.
Q. What was the nature of your assignment?
A. To investigate the possibility of any criminal violations of the Internal Revenue Code. (Transcript, pages 16 & 17)
Q. With the informal testimony of the F.B.I. records and the internal records of the I.R.S. and the interviews, then you still have no idea what you're looking for, you still have not decided what violations may or may not have occurred?
A. Did you ask me?
Q. Is that correct?
A. Well, sir, I'm attempting to determine whether or not there are any criminal violations of the I.R.C. (Transcript, p. 37).
Q. And to gather the facts you must have some idea of which way the investigation is going, otherwise how do you know which facts to look for?
A. The leads which we have developed based upon the information received will tell me whether or not Mr. Gattuso in fact did violate any criminal section of the Code.
Q. Isn't is true that your own manual of procedures suggests that you try to focus in and find out what violations have occurred so that you

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[1] For the convenience of the Court all pages of the transcript cited in Respondents' Brief are attached hereto as Exhibit A.

don't go haphazardly around looking for information, but have a focus and direction of investigation? Do you recall reading that in your manual?

A. Absolutely.

Q. Is there a revenue officer working with you in conjunction with this case?

A. No, sir.

Q. Is there a revenue agent with you working on this case in conjunction with this case?

A. No, sir, not at this time. (Transcript, pages 38 and 39)

During direct examination by Mr. Cushner of Mr. Gregory Perry, the following exchange took place.

Q. Calling your attention to that meeting of July 11, 1975, could you tell me who was present at that meeting?

A. John Olivero, another agent, Special Agent Wilmowski, yourself and myself were there.

Q. Do you recall what the subject matter of that meeting was?

A. The subject matter was an investigation being conducted by Mr. Olivero regarding Mr. Gattuso.

Q. Why were you present at that meeting?

A. Our firm was retained by Mr. Gattuso to represent him in this investigation.

Q. To the best of your recollection, what, if anything, did you say or did they say to you?

A. At the meeting we discussed the nature of the investigation, which Mr. Olivero was conducting at the time, and I asked him what civil aspect of the investigation he was getting into and he said his investigation was strictly related to criminal violations of the Internal Revenue Code. I also discussed with him the nature of these criminal violations and at the time he was unwilling to disclose them; and I also asked him if there was a joint investigation and whether there were any Revenue Agent or Officer assigned to the case with him and he said no, it was strictly a criminal investigation. That basically concluded our meeting at that time. (Transcript, pages 45 and 46)

It should also be noted that the subjective impressions of the Court after hearing the testimony and observing the demeanor of the witnesses was to the effect that the investigation being conducted by Special Agent Olivero was a criminal investigation.

The Court: To finish your silligism, (sic) Mr. Cushner, assume that the records reflect that the Olivero investigation is criminally based, and I am in agreement with you that he didn't say anything in his testimony about civil tax liability, what are the consequences of that? Are they inevitable in your mind? (Transcript, p. 54)

The Court: Now, unless I find something in camera inspection that gives more support to the Government's position than the Agent's testimony did, it would be my conclusion that he was at all times involved in a criminal investigation, at least in his own mind." (Transcript, p. 63)

The United States Supreme Court in *Abel* v. *United States*, 362 U.S. 217 stated unequivocally the position of the Court with respect to the use of such administrative Summonses in the conduct of criminal investigations:

> "The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States."

Supra at 226.

The Supreme Court has also dealt directly with the question of the use of a Summons in obtaining evidence

for use in a criminal prosecution. In *Reisman* v. *Caplin*, 375 U.S. 440 (1964) the court stated:

> "Furthermore, we hold that in any of these procedures before either the District Judge or United States Commissioner, the witness may challenge the summons on any appropriate grounds. This would include, as the Circuits have held, the defenses that the materials are sought for the improper purpose of obtaining evidence for use in a criminal prosecution, Boren v. Tucker, 239 F.2d 767, 772-773, . . ."
>
> *Supra* at 449.

More recently the Supreme Court has once again dealt with the standards to which the Government is held with respect to the enforcement of such Summonses. In *Donaldson* v. *United States*, 400 U.S. 517 (1971) the Court stated:

> "We hold that under Section 7602 an Internal Revenue Summons may be issued in aid of an investigation if it is issued in good faith *and* prior to a recommendation for criminal prosecution." (Emphasis added)
>
> *Supra* at 536.

The *Donaldson* case clearly requires that the Government not only issue the Summons prior to a recommendation for criminal prosecution, but further that said Summons be issued in good faith. The fact that both requirements must be met finds further support in the later Supreme Court case of *Couch* v. *United States*, 409 U.S. 322 (1973) wherein the Court noted in its footnote discussing the *Donaldson* case:

> "Donaldson cautioned only that the Summons be issued in good faith and prior to a recommendation for criminal prosecution. (citation omitted) Neither of those conditions is successfully challenged here." N. 8 *Supra* at 326.

It is apparent that the Court considers the requirements in the disjunctive and would hold the Government to meeting both standards.

In the cause herein the direct testimony of the Special Agent has been that no criminal prosecution has yet been recommended. It is equally clear, however, that the civil tax liability of the taxpayer, or any other proper determination that may be aided by a summons, is not the subject matter of this investigation. The testimony discloses that the investigation being conducted by the Special Agent is solely criminal in nature and only for the purpose of gathering evidence for a criminal prosecution. It is not the Respondents' position that the mere entry of the Special Agent renders a Summons invalid, nor is it the Respondents' position that an investigation such as the instant one conducted solely by a Special Agent renders the Summons invalid. Rather, Respondents suggest that the Government cannot and does not meet the requirement that the Summons be issued in good faith when the investigation is solely for the purpose of gathering evidence for use in a criminal prosecution.

To enforce the instant Summonses the Respondents suggest would be to clearly ignore the requirements enunciated in both *Donaldson* and *Couch*. It is not enough that a recommendation for criminal prosecution has not been made. The Summons must also have been issued in good faith.

Prior to the decisions in both *Donaldson* and *Couch* the Seventh Circuit was applying the standards enunciated therein. In *United States* v. *Moriarty*, 435 F.2d 347 (7th Cir., 1970) the Court stated:

> "The fact that the Summons was issued by the Special Agent does not preclude its enforcement. As long as the determination of civil tax liability is genuinely a purpose of the Summons, it will be enforced, as the Summons, or its enforcement does not become improper because it may also produce evidence warranting criminal prosecution. (citations omitted) Here the civil tax audit has not been completed, the inspection of the additional records is needed, and the continued access to the corporation's records is essential to a proper completion of the audit. There is no basis for a conclusion that the sole purpose of

the investigation, or the Summons is to obtain evidence for a criminal prosecution." *Supra* at 349.

Following the decision in *Donaldson* the Seventh Circuit in *United States* v. *National State Bank* v. *George Green, M.D.*, 454 F.2d 1249 (7th Cir., 1972) the Court stated in citing *Donaldson*:

> "The essence of the District Court's decision is that the Summons issued in an investigation of civil liability with a possibility of criminal prosecution, but with no criminal prosecution pending, and was accordingly issued in good faith, the record justifies the court's finding of those facts. And the pertinent rule of Donaldson validates the Summons which issued 'in good faith and prior to a recommendation for criminal prosecution'. (citation omitted) *Supra* at 1252.

Following the decision in the *National State Bank* case the Seventh Circuit decided the *United States* v. *Turner*, 480 F.2d 272 (7th Cir., 1973) which was cited by the Government in argument in support of their position. Although *Turner* dealt generally with the limitation of discovery in such actions, it did once again deal with the *Donaldson* decision.

> "Their testimony on the valid civil purpose of the investigation, as well as their representation that no prosecution, against Turner had been recommended, Donaldson v. United States (citation omitted) provided ample justification for the limitation of discovery." *Supra* at 276.

Most recently, the Seventh Circuit has dealt with the enforceability of such Summonses in the *United States of America* v. *Robert J. Awerkamp*, 397 F.2d 832 (7th Cir., 1974). This case involved a Summons issued by a Revenue Agent, not a Special Agent, against a pro se petitioner. There the court stated:

> "Respondent argues that the Summonses being used for an improper purpose because the information being sought will be used to recommend a criminal prosecution for a violation of 26 U.S.C. § 7203. In Donaldson v. United States (citation omitted) the Supreme Court held that: 'Congress clearly has authorized the use of the Summons in investigating what may prove to be criminal conduct.' Up until the point 'again where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution . . .'."
>
> *Supra* at 834.

If an investigation has reached the point where a recommendation for criminal prosecution has been made it becomes clear that the sole objective of the investigation is to obtain evidence for use in that criminal prosecution. Nevertheless, the recommendation for criminal prosecution is only indicia and not the sole standard for determining whether a summons has been issued in good faith. The court must focus on all the activities undertaken by a Special Agent to determine whether enforcement is proper. To ignore events prior to a possible recommendation could result, as in the instant proceedings, in a summons being enforced where the sole objective of the investigation is to obtain evidence for use in a criminal proceeding. Such reasoning is compelled by the two prong standard enunciated in both *Donaldson* and *Couch*, and by the facts in the instant case where the sole purpose of the investigation has been established by the direct testimony of the Special Agent.

The only reported Circuit Court of Appeals decision that is directly on point is the very recent case of *United States* v. *Thomas F. Zack*, 521 F.2d 1366 (9th Cir., 1975). The facts in *Zack* are similar to those that exist in the instant case. A Special Agent issued an Internal Revenue Service Summons to a third-party in aid of what was alleged to be a criminal investigation of the taxpayer. In *Zack* the Court below found that the previous issuance of a search warrant was sufficient to raise a non-rebuttable presumption that the investigation was solely criminal in nature and it therefore denied enforcement. The Court of Appeals reversed and remanded only on the basis that the issuance of a prior search warrant was not

conclusive as to the issue of whether the summons was issued solely for a criminal purpose and as such was not sure that the District Court had applied the proper test. Nevertheless, the opinion in that case fully supports the position taken by the Respondents in this cause.

> "An I.R.S. administrative summons may be issued pursuant to 26 U.S.C. § 7602 in furtherance of an investigation to ascertain correct Federal tax liabilities (citation omitted). Enforcement should be denied, however, if it is issued for an improper purpose such as solely in furtherance of a criminal investigation."
>
> *Supra* at 1367.

The Court also states in full accord with the Respondents' position that it is not necessary for a prosecution to be pending for the court to find the investigation to be for solely criminal purposes.

> "The Government argues that, as a matter of law, a court cannot find an investigation to be for solely criminal purposes unless a prosecution is pending. We disagree. It is true that an investigation after indictment may be deemed solely in furtherance of the criminal prosecution (citations omitted). The same would be true if a recommendation for criminal prosecution has been made. (citation omitted) But indictment or recommendation of criminal prosecution is not a prerequisite to a finding that an investigation is solely criminal. (citations omitted)
>
> The Government argues to the contrary, relying upon language in Donaldson v. United States, supra where the court stated that a District Judge should find an improper purpose and refuse to enforce an I.R.S. summons in 'the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes. (citations omitted) Properly interpreted, this statement does not require the limitation suggested by the Government. The disjunctive 'or' leaves no doubt but that the administrative summons should not be enforced if either: (1) there is a pending criminal charge, or (2) the investigation is solely for criminal purposes.

> However, in the final paragraph of Donaldson, the court stated that 'an Internal Revenue Summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution'. (citation omitted) From this we conclude that even prior to a recommendation for criminal prosecution, an administrative summons should not be enforced unless it is issued in good faith. *We harmonize this 'good faith' requirement with the language disapproving the use of the summons in 'an investigation solely for criminal purposes' by concluding that the Government would not be in good faith if it uses an administrative summons solely for criminal prosecution purposes.* Thus, in this case, if the administrative summons was used solely for criminal purposes, it is not issued in good faith and is inpermissible. This is true even though there has been no recommendation for prosecution. (citations omitted) (Emphasis supplied.)

The Fourth Circuit has also followed the *Zack* reasoning. In *U.S.* v. *Charles Theodore*, 479 F.2d 749 (4th Cir., 1973) the court stated:

> "Only where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution will the purpose of a summons be said to violate the Fourth Amendment and enforcement be denied." *Supra* at 753.

More recently, the Third Circuit in *U.S.* v. *Lafko*, 520 F.2d 622 (3rd Cir., 1975) followed the reasoning in *Zack* and stated:

> "In opposition to the Government's attempt to enforce the Summons, intervener Rolle asserted that Internal Revenue was improperly using its Summons

power to obtain incriminating evidence for use in Mr. Rolle's prosecution—a purpose not authorized by 26 U.S. Code § 7602. The Supreme Court has recognized this 'improper purpose' defense as a ground for refusing to enforce an Internal Revenue summons. (citations omitted) Section 7602 permits the Internal Revenue Service to summon a taxpayer's records for the limited purpose of 'ascertaining the correctness of any return'. Internal Revenue has no authority to conduct a criminal investigation through the use of its summons power. (citations omitted) In this letter opinion of August 6, 1974, the District Judge rejected Mr. Rolle's contention that Internal Revenue issued the summons for an unauthorized purpose citing as his sole reason: '. . . this court is satisfied that although Rolle is under investigation for possible civil and criminal proceedings, the matter has not reached the stage where any decision has been made by the Justice Department to proceed.'

> Under these circumstances, 'it is clear that the defendant Lapko should be directed to comply with a summons issued by the Internal Revenue Service. (citation omitted)'. This application of the Donaldson standard is patently erroneous. A preceding Justice Department recommendation to prosecute is not the sine qua non for proving that an Internal Revenue summons was issued for an improper purpose. The District Judge apparently relied on the statement in the Donaldson opinion that an Internal Revenue summons is enforceable if issued 'in good faith and prior to recommendation for criminal prosecution'. (citation omitted) At a minimum, the District Judge's letter opinion ignores the question of good faith, a question entirely separate from whether or not a formal recommendation to prosecute had been made." *Supra* at 624, 625.

It is clear from the foregoing and from the testimony taken herein that the Internal Revenue Service is conducting a purely criminal investigation. The agent has stated directly on the stand that his only purpose and

that his assignment is to investigate the criminal tax liability of the taxpayer under investigation. The more possibility of civil tax liability, or any other proper purpose for which a summons may be issued, has nowhere been demonstrated by the Internal Revenue Service in the instant proceeding. In view of the foregoing authorities and the testimony herein it is respectfully suggested that the instant Summonses should not be enforced and that the action herein be dismissed with prejudice.

Respectfully submitted,

/s/ Matt P. Cushner
MATT P. CUSHNER,
Attorney for Respondents

Of Counsel:

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Chicago, Illinois 60601
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STATE OF ILLINOIS)
COUNTY OF COOK) ss.
)

AFFIDAVIT OF MAILING

MARY ELLEN KOZELUH, on oath, deposes and says that she has served the foregoing Respondents' Brief in Opposition to Enforcement of Internal Revenue Service Summons by mailing a copy to Mr. Stanley Kubacki at the United States Attorneys Office, 219 South Dearborn Street, Chicago, Illinois 60604 and has deposited the same in the U.S. mail before the hour of 5:00 p.m. on

December 23, 1975 at 180 North LaSalle Street, Chicago, Illinois with proper postage paid.

/s/ Mary Ellen Kozeluh
MARY ELLEN KOZELUH

Subscribed and Sworn to Before me this 23rd day of December, 1975.

/s/ Yolanda Howard
YOLANDA HOWARD
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

UNITED STATES OF AMERICA AND JOHN F. OLIVERO,
SPECIAL AGENT, INTERNAL REVENUE SERVICE,
PETITIONERS,

vs.

LASALLE NATIONAL BANK AND JOSEPH W. LANG,
VICE-PRESIDENT, LASALLE NATIONAL BANK,
RESPONDENTS.

RESPONDENTS' REPLY

The Memorandum of the Petitioners' filed herein deals briefly with the testimony of Special Agent Olivero. The memorandum directs the Court's attention to pages 6 and 37 of the transcript and indicates that the testimony found therein characterizes the investigation as involving "the determination of the tax liabilities of John Gattuso for the years under investigation" and "to see if there are any violations of the Internal Revenue Code". A reading of those pages would indicate rather, that the Special Agent is investigating "the possibility of criminal violations of the Internal Revenue Code" (Tr. 6) and that he is "attempting to determine whether or not there are any criminal violations of the I.R.S." (Tr. 37).

Petitioners' Memorandum also alleges that one of the purposes for the issuance of the Summonses herein was "to check the accuracy of rental income reported by the taxpayer on properties held by the LaSalle National Bank as trustee.". (TR. 7) The actual testimony on page 7 indicates that the taxpayer had filed income tax returns disclosing rental income from real property. The trust records held by the LaSalle National Bank could do nothing more than disclose the ownership of the beneficial interest of the land trusts. Ownership was already dis-

closed in the tax return of the taxpayer as indicated by the testimony of the Special Agent and the land trust records of the bank would be of absolutely no value in determining the correctness of the rental income derived from real property held by it in trust. It is clear that whatever the Special Agent's purpose might have been in issuing the Summons to the bank. it could not have been to check the accuracy of the rental income reported. The Bank is mere title holder and has no responsibilities for the operation of the property including the collection of rental income.

The Petitioners allege that their Summonses are enforceable notwithstanding the fact that they are issued "principally to investigate for criminal liability or for the primary purpose of furthering a criminal tax investigation". The Petitioners cite as authority, therefore, *United States* v. *Michigan Bell Telephone Co.*, 415 F.2d 1284, (Ct. of Appeals, 6th, 1969) and *United States* v. *Held*, 435 F.2d 1361 (Ct. of Appeals, 6th, 1970).

In *United States* v. *Michigan Bell Telephone Co.*, the case was tried on stipulated facts. Paragraph 6 of the stipulation indicated that the Michigan Bell Telephone Co. had refused to appear and produce the summoned records because the Internal Revenue Service had refused to assure Michigan Bell Telephone that the records demanded were unconnected with any criminal investigation. The Court then indicated that the mere fact the Internal Revenue Service refused to make such assurances to the telephone company was not sufficient to exclude the possibility that the Summons was also issued to determine a civil tax liability. Further, the Court indicated that the Commissioner of Internal Revenue would be entitled to enforcement of the Summons if the requirements of *United States* v. *Powell*, 379 U.S. 48 (1964), met. Although this case preceded the Supreme Court decision in *Donaldson* v. *United States*, 400 U.S. 517 (1971) the Court in *Michigan Bell* also stated that it would have been an abuse of the Court's process to enforce the Summons were the Summons issued for an improper purpose reflecting on the good faith of the investigation.

Further, in *United States* v. *Held*, the Court in the recitation of the facts stated that the Summons grew out of a joint investigation being conducted concurrently by a Revenue Agent and Special Agent of the Internal Revenue Service. The Court indicated that the civil tax aspects of the case were at least co-extensive with the possibility of criminal action and this finding was apparently acquiesed in by the Appellant who raised on review the question of whether a Summons could be issued for the dual purpose of ascertaining both civil tax liability and the presence of criminal tax fraud. It is apparent that neither of these cases are authority for the service to issue a Summons in aid of a criminal investigation. Further, both cases predate the decision in *Donaldson, supra* which for the first time enunciated clearly the disjunctive standard of "'good faith" in the issuance of such Summonses.

The Petitioners state that the burden is upon the Respondents to prove that there is no civil purpose to the Summons. The Petitioners are correct in that the Respondents do carry the burden. The burden, though, is not to show that there is no civil purpose to the Summons, but rather that the enforcement of the Summons would be an abuse of the Court's process. Whatever burden the Respondents have was met at the hearing herein. The Court itself stated: "I'll say now that I heard nothing in Agent Olivero's testimony to suggest that the thought of a civil investigation ever crossed his mind." (TR. 61). Whether the Petitioners' burden can be said to rest on the *pre-Donaldson* standard of the showing that the Summons was issued for an improper purpose or to the *post-Donaldson* standard that the Summons was not issued in good faith, such burden has in fact been met.

The Petitioners argue that the mere presence of a Special Agent in an investigation does not render a Summons improper. The Respondents did not and do not argue that proposition. Petitioners do argue, however, that the "focus" of an investigation does have probative value with respect to the purpose of the investigation, as well as the "good faith" of the Internal Revenue Service in its issuance. The *Donaldson* case says nothing to the

contrary, but merely recites the proposition that the mere presence of a Special Agent does not render a Summons invalid.

The only evidence presented at the hearing relating to criminal purpose is not, as the Petitioners suggest, Agent Olivero's testimony concerning his duty to investigate possible criminal violations, but rather, his consistent and constant testimony that his purpose, his investigation, and finally his issuance of the Summonses herein were for the sole purpose of conducting a criminal investigation. The Court having heard and considered the testimony stated such, and to hold the Summons unenforceable would not be as the Petitioners allege, to draw a line upon the appearance of a Special Agent, but rather to refuse enforcement of a Summons that was issued for an improper purpose and not in "good faith".

The mere fact that the Petitioners assert that the duties and responsibilities of the Special Agent generally include certain audit functions, does not lead inescapably to the conclusion that every investigation conducted by a Special Agent is in furtherance of those responsibilities. If that were the case, as the Government now suggests, there would be no need for a hearing and certainly no need for cross-examination of the Special Agent. The Court could merely take judicial notice of these "duties and responsibilities" and enforce each and every Summons brought before it.

The Petitioners reliance on *United States* v. *Awerkamp*, 497 F.2d 832 C.A. 7th (1974) is clearly misplaced. In *Awerkamp* the Government was seeking to enforce a Summons issued by a Revenue Agent. The Court indicated in its opinion that the purpose of the Summons was to gather information for the completion of tax returns for 1970 and 1971 and that the Summons had been issued by a Revenue Officer in the Collection Division. As such the Summons was issued strictly in furtherance of a civil function of the Internal Revenue Service, the collection of a tax.

It should be noted that the Court dealt only with the standard enunciated in *Powell, supra*, i.e., was the Summons issued for an improper purpose.

The Court did indicate that a Summons may be used until the point when the sole objective of the investigation is to obtain evidence for use in a criminal prosecution. The Court also stated that this point is reached when the recommendation for criminal prosecution is made. Nevertheless, the Court no where indicated that the mere absence of such recommendation is sufficient to meet the standards set out in *Powell*.

It should also be noted that in view of the facts underlying the *Awerkamp* decision, i.e., the issuance of the Summons by a Revenue Officer in the Collection Division, there was no need to argue or decide the "good faith" standard as enunciated in *Donaldson*.

In view of the foregoing, and the previous Memorandum filed by Respondents herein, it is respectfully urged that the Petition filed herein to enforce the Internal Revenue Service Summons be denied.

/s/ Matt P. Cushner
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Attorney for Respondents

Of Counsel:

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STATE OF ILLINOIS)
COUNTY OF COOK) ss.
)

AFFIDAVIT OF MAILING

MARY ELLEN KOZELUH, being first duly sworn on oath deposes and says that she has mailed a true and correct copy of the foregoing Respondents' Reply to:

Mr. Stanley Kubacki
Asst. U.S. Attorney
219 South Dearborn Street
Chicago, Illinois 60604

by depositing a copy of same with postage prepaid in the U.S. Mail at 180 North LaSalle Street, Chicago, Illinois 60601 on the 9th day of January, 1976.

/s/ Mary Ellen Kozeluh

Subscribed and Sworn To before me this 9th day of January, 1976.

/s/ Beth M. Walls
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

[Received May 6, 1976, H. STUART CUNNINGHAM, Clerk, United States District Court]

UNITED STATES OF AMERICA AND JOHN F. OLIVERO, SPECIAL AGENT, INTERNAL REVENUE SERVICE,
PETITIONERS,

v.

LASALLE NATIONAL BANK AND JOSEPH W. LANG, VICE-PRESIDENT, LASALLE NATIONAL BANK,
RESPONDENTS.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the UNITED STATES OF AMERICA appeals to the United States Court of Appeals for the Seventh Circuit from the Order of March 9, 1976, denying the petition of the United States of America and John F. Olivero, Special Agent of the Internal Revenue Service, for the enforcement of Internal Revenue summonses served upon the respondent, LaSalle National Bank.

SAMUEL K. SKINNER
United States Attorney

Notice Should Be Served Upon:

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SDKubacki:bj
353-8694

SUPREME COURT OF THE UNITED STATES

No. 77-365

UNITED STATES, PETITIONER,

v.

LASALLE NATIONAL BANK, ET AL.

ORDER ALLOWING CERTIORARI. Filed December 12, 1977.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

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Supreme Court, U. S.
FILED
NOV 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-365

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

LASALLE NATIONAL BANK, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Question Presented	1
Statement of the Case	1
Reasons for Denying the Petition	4
Conclusion	15
Appendix A	1a
Appendix B	4a
Appendix C	17a

CITATIONS.

Cases.

Abel v. United States, 362 U. S. 217 5

Donaldson v. United States, 400 U. S. 517 ..... 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

Reisman v. Caplin, 375 U. S. 440 ..... 5, 6, 9, 12, 13, 14

United States v. Billingsley, 469 F. 2d 1208 ..... 12, 13

United States v. Hodge and Zweig, 548 F. 2d 1351 ..... 11, 12

United States v. Troupe, 438 F. 2d 117 ..... 8, 10

United States v. Wall Corp., 475 F. 2d 893 ..... 10, 11

United States v. Weingarden, 473 F. 2d 454 ..... 9, 10, 11

Statutes.

Internal Revenue Code of 1954, 26 U. S. C. § 7602 ..... 7, 10, 12, 15

Illinois Revised Statutes, Ch. 29, § 8.31 (1971) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-365.

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

LASALLE NATIONAL BANK, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTION PRESENTED.

Whether the Internal Revenue Service properly may issue a summons solely in aid of a criminal investigation.

STATEMENT OF THE CASE.

On August 15, 1975, two summonses from the Internal Revenue Service were served upon the Respondents. The summonses were directed to the LaSalle National Bank as trustee under two Illinois land trusts and required the Respondents to appear and give testimony as well as produce records with respect to these land trusts.[1]

1. An Illinois land trust is a contract by which a trustee is vested with both legal and equitable title to real property and the interest

(Footnote continued on next page)

The Respondents appeared in response to the summonses, but, on advice of counsel, did not produce the land trust records or give testimony.

On November 19, 1975, the Petitioners herein filed a petition seeking judicial enforcement of the summonses. On that date the District Court for the Northern District of Illinois entered an Ex Parte Order requiring the Respondents to appear on December 5, 1975, and to show cause why they should not be compelled to obey the two Internal Revenue Service summonses served upon them on August 15, 1975.

Pursuant to the Order, the Respondents appeared on December 5, 1975, at a hearing held by the district court to determine the enforceability of the two Internal Revenue Service summonses. Special Agent John F. Olivero was the sole witness on behalf of Petitioners and his investigative file was examined by the district court *in camera.*

On March 9, 1976, the district court entered its Order and Memorandum Opinion denying judicial enforcement of the two Internal Revenue Service summonses, stating in its opinion that "[i]t is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso." (App. A, p. 3a)

On May 7, 1976, the Petitioners herein filed their Notice of Appeal. The cause was briefed and set for argument before

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(Footnote continued from preceding page.)
of the beneficiary is considered personal property. Under this trust the beneficiary or any person designated in writing by the beneficiary has the exclusive power to direct or control the trustee in dealing with the title and the exclusive control of the management, operation, renting and selling of the trust property together with the exclusive right to the earnings, avails and proceeds of said property. Ill. Rev. Stat. ch. 29, § 8.31 (1971).

the United States Court of Appeals for the Seventh Circuit, which issued its opinion on April 11, 1977.

The court of appeals defined its undertaking in terms of two questions. The first issue concerned the court's scope of review, while the second issue was characterized by the court as "whether the district court applied the proper legal test in making its finding of fact." (App. B, p. 9a)

It is apparent from a reading of the opinion below that the court of appeals dealt unequivocally with the second question resolving it in favor of the Respondents:

> We agree with the respondents that the petitioners arguments ignore the good faith requirement of *Donaldson.* We further agree that the real issue before the court is whether the Internal Revenue Service may issue a summons solely in aid of a criminal investigation and still meet the standard of good faith as enunciated in *Donaldson.* (App. B, p. 4a)

Relying on *Donaldson* v. *United States,* 400 U. S. 519, and the standard for enforcing an Internal Revenue Service summons provided therein, the court of appeals stated:

> We think that the Government oversimplifies the evidentiary posture of the case. Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him. (App. B, p. 15a)

Finally, the court of appeals found no misapplication of the standards set forth in *Donaldson*:

> We note that the district court expressly observed that the *bona fides* of the investigation was in issue. The Government attempts to use the district court's statement as an indication that it applied the wrong legal test. Our reading of the reported cases persuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith. In view of our reading of the crucial language in *Donaldson, see* 400 U.S. at 536, we read the statement as a faithful reflection of that decision's alternative holding. (App. B, p. 15a)

In June, 1977, the Petitioners herein requested from this Court an extension of time from July 10, 1977, to and including September 8, 1977, within which to file a petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The motion of the Petitioners was granted, and on or about September 8, 1977, the Petitioners herein filed their Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The Respondents herein requested an additional thirty days within which to file a response to the Petition for a Writ of Certiorari and were granted an extension of time to and including November 7, 1977.

REASONS FOR DENYING THE PETITION.

1. a. The Petitioners herein characterize the question presented to the court as "Whether an internal revenue summons may properly be issued to obtain third party records in aid of an administrative investigation conducted by the Internal Revenue Service to determine whether it should recommend to the Department of Justice that a taxpayer be prosecuted for criminal tax violations." (Pet. p. 2)[2]

Although the Petitioners may have an interest in resolving the question posed in their Petition, that question bears no relation to the issue that would be before this Court if the Petition herein were granted. It is abundantly clear from the opinion of both the district court and the court of appeals that the issue litigated and decided below was whether the Internal Revenue Service may issue a summons in an investigation solely for criminal purposes.

The difference between the foregoing and the question posed by the Petitioners is more than semantic. The question of whether the summonses herein properly were denied enforcement must be decided not only with reference to *Donaldson*, but also with

2. "Pet." refers to the Petition filed herein.

reference to the broader issue of the government's administrative subpoena power. As this Court stated per Justice Frankfurter in *Abel* v. *United States*, 362 U. S. 217,

> The deliberate use by the government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States. (362 U. S. at 226)

The distinction between the issues herein and the issues facing the Court in *Donaldson* is significant, although the standard in *Donaldson*, based on the Court's opinion in *Reisman* v. *Caplin*, 375 U. S. 440, has been applied correctly in the instant proceeding.

In *Donaldson* the taxpayer urged that an internal revenue summons could not be utilized in aid of an investigation that had the potentiality of resulting in a recommendation that a criminal prosecution be instituted against the taxpayer.

The facts of the instant case and the findings from which the Petitioners wish to appeal simply are not analogous. Here the Respondents argued that the summonses were issued solely in aid of a criminal investigation. The legal basis upon which the Respondents relied is twofold: (1) that an Internal Revenue Service summons may not be issued solely in aid of a criminal investigation, and (2) that the administrative subpoena power of the Internal Revenue Service is limited constitutionally.

The district court below found that the special agent "was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso." (App. A, p. 3a) Citing both *Donaldson* and *Reisman*, the Court denied enforcement of the summonses.

The United States Court of Appeals for the Seventh Circuit found no difficulty in sustaining the factual findings of the district court.

> Assuming arguendo that the Supreme Court has not overruled or qualified *Donaldson* in its more recent adjudications, there is ample support in the record for the district court's finding of sole criminal purpose. The record establishes that Olivero testified to the existence of a civil purpose but that the district court, who observed the demeanor of the witnesses, discredited that testimony. We are not left with a firm and definite conviction that [a] mistake has been made. (App. B, p. 9a)

Further, the Court stated:

> Our reading of the reported cases persuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith. In view of our reading of the crucial language in *Donaldson, see* 400 U. S. at 536, we read the statement as a faithful reflection of that decision's alternative holding. (App. B, p. 15a)

Neither the district court nor the court of appeals dealt directly with Petitioners' argument as to the constitutional limitations of the Internal Revenue Service's administrative summons power. However, their agreement in finding, first, that the summonses were issued solely in aid of a criminal investigation and second, that summonses so issued could not meet the good faith standard articulated in *Donaldson*, precluded the necessity for either court to consider these constitutional limitations.

The statutory power of the Internal Revenue Service to issue summonses is not limited by the standards and requirements surrounding the issuance of a warrant of search and seizure. If the Internal Revenue Service may issue a summons solely in aid of a criminal investigation, the protections afforded by the Fourth and Fifth Amendments to the Constitution of the United States of America are rendered meaningless. The Petitioners already have suggested that the Fourth and Fifth Amendments can be ignored prior to a recommendation for criminal prosecution. However, the instant proceeding need not be decided on this Constitutional ground should the Court follow its prior decisions in *Donaldson* and *Reisman* that a summons cannot be issued solely in aid of a criminal investigation.

b. Petitioners' advocacy of their position has resulted in more than mere misstatement of the issue before the Court. The Petition filed herein offers misquotations from the *Donaldson* decision as support for the position taken by the Petitioners.

The first sentence of the Petitioners' argument contains the following quotation, purportedly from *Donaldson*, 400 U. S. at 536: "under § 7602 [of the Internal Revenue Code] an internal revenue summons may be issued in good faith and prior to a recommendation for criminal prosecution." (Pet. p. 6) The correct quotation itself differs markedly from that submitted by the Petitioners:

> We hold that under § 7602 an internal revenue summons may be issued *in aid of an investigation if it is issued* in good faith and prior to a recommendation for criminal prosecution. (*id.* at 536) (Emphasis added.)

In their zeal, the Petitioners not only omitted words crucial to the context and meaning of the quoted lagnuage, but supplied parentheticals where none in fact existed.

The Petitioners' misuse of quotations is not confined to the above instance. In the second paragraph of the argument, the Petitioners, once again purporting to quote *Donaldson*, state:

> Despite the Court's unequivocal ruling in *Donaldson* that an internal revenue summons "may be issued in good faith and prior to an recommendation for criminal prosecution," the court of appeals held that a special agent may not issue a summons for third party records in aid of a criminal investigation even though there has been no recommendation for prosecution. (Pet. p. 6)

The unequivocal ruling followed by the court of appeals was not that which was attributed to it by the Petitioners, but rather: "we hold that under § 7602 an Internal Revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." (*id.* at 536)

There is a distinct difference between the statement that an Internal Revenue summons may be issued in good faith and

prior to a recommendation for criminal prosecution and the statement that "an Internal Revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." (*id.* at 536.)

c. The Petitioners herein refer the Court to *United States* v. *Troupe*, 438 F. 2d 117 (C. A. 8) and contend that it conflicts with the decision below. A reading of *Troupe*, however, demonstrates that the decisions are in agreement. The court in *Troupe* states:

> The primary argument presented on appeal is that the district court erred in its interpretation of Reisman v. Caplin, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964), in requiring a showing that the *sole* purpose of investigation be criminal in nature before a challenge to the summons can be made. (438 F. 2d at 119) (Emphasis in original)

The issue in *Troupe*, as in *Donaldson*, was whether the enforcement of an Internal Revenue Service summons could be denied on the grounds that one of the purposes for which it was issued was to investigate what might prove to be criminal conduct. It is sheer sophistry to allege a conflict between the decision below and the decision in *Troupe*. In the instant action, the court below found that the summons had been issued solely in aid of a criminal investigation. In *Troupe*, the court found that the investigation therein could not be so characterized and, citing this Court's opinion in *Donaldson*, stated:

> Thus, it is only when the *sole* purpose of the summons is for a criminal investigation that a challenge to the summons can be made. (*id.* at 119)

d. The Petitioners assert:

> Moreover, the courts of appeals are in disagreement over when Donaldson prohibits use of an Internal Revenue summons in connection with a possible criminal case. (Pet. p. 7)

Not only is the statement that the courts of appeals are in disagreement incorrect, but the focus of Petitioners' assertion

avoids the issue that is before the Court. The question is whether the Internal Revenue Service may issue a summons solely in aid of a criminal investigation and not when *Donaldson* prohibits the use of a summons in connection with a possible criminal case. The Respondents did not contend below, and do not argue now, that the Internal Revenue Service is prohibited by *Donaldson* or any other case from issuing a summons in aid of an investigation where "the potentiality of an ultimate recommendation for prosecution" exists. 400 U. S. at 536.

The legitimacy of a summons which may issue in aid of a joint investigation or in an investigation in which there is a potential for recommendation for prosecution is not in issue. At issue is the right of the Petitioners to issue a summons solely in aid of a criminal investigation. The courts of appeals have not been in disagreement regarding the application of either *Donaldson* or *Reisman* to this question.

The Petition filed herein cites the Court to *United States* v. *Weingarden*, 473 F. 2d 454 (C. A. 6), indicating that the court rejected the government's assertion that a summons is enforceable so long as it is issued prior to a recommendation for prosecution.

This reference to *Weingarden* gives the mistaken impression that the Petitioners were not the prevailing party therein. In *Weingarden* the Petitioners had appealed from a finding by the district court that the summons involved therein had been issued solely in aid of a criminal prosecution. On appeal, the court reversed, stating:

> Considering all of the evidence, together with the inferences to be drawn therefrom, we are of the opinion that one of the purposes of the investigation and audit was to determine civil tax liability and possible fraud penalties. (473 F. 2d at 461)

The *dicta* to which the Petitioners seem to take exception was the rejection by the court of the government's analysis

that a summons even if issued solely in aid of a criminal investigation, is enforceable under *Donaldson* if it is issued prior to a recommendation for prosecution.

The applicable holding in *Donaldson* upon which the Petitioners relied in *Weingarden* read:

> We hold that under Section 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution. (*id.* at 536)

The *dicta* in *Weingarden* does not indicate what the Petitioners' position was with respect to the requirement of good faith. The court found it sufficient to state that the district court applied the correct standard when it denied enforcement of the summons on the basis that the sole purpose for its issuance was to gather information in aid of a criminal prosecution.

The question of good faith, however, was central to the courts analysis in *Weingarden*. Reversing the decision below, the court concluded that, although a summons issued solely in aid of a criminal investigation cannot meet the "good faith" standard of *Donaldson*, the finding that the summons had been issued for such a purpose was erroneous.

The Petitioners also refer the court to footnote 11 in the *Weingarden* decision, where the court indicated that the position advanced by the government in the *Weingarden* case apparently was accepted by the Eighth Circuit in *Troupe*. As the Respondents have indicated above, the *Troupe* decision was in accord not only with *Weingarden* but with the instant action as well.

> Thus, it is only when the *sole* purpose of the summons is for a criminal investigation that the challenge to the summons can be made. (438 F. 2d at 119)

The Petitioners cite the court to *United States* v. *Wall Corp.*, 475 F. 2d 893 (C. A. D. C.), indicating that the court premised enforceability of the summons upon the subjective motivation

of the agent. Again, the impression given that the Petitioners had not been the prevailing party is mistaken. The court, in a *per curiam* affirmance of the decision below enforced the summons.

The *dicta* in *Wall* neither "carried the 'sole criminal purpose' test one step further" nor premised the enforceability of the summons upon the subjective motivation of the agent (Pet. p. 8). The court in *Wall* merely analyzed the good faith standard in *Donaldson*, which was neither necessary nor appropriate in the *Weingarden* case. In *Wall* the court stated:

> Our inquiry is not ended upon a determination that prosecution has neither been instigated nor recommended, since *Donaldson* also requires that a summons be issued 'in good faith.' This, if it can be shown that the investigating agent had already formed a firm purpose to recommend criminal prosecution even though he had not as yet made a formal recommendation, issuance of the summons would presumably be in bad faith. (475 F. 2d at 895)

The Petitioners then seek to contrast the holdings in both *Wall* and *Weingarden*, as well as the holding below with the holding in *United States* v. *Hodge and Zweig*, 548 F. 2d 1347 (C. A. 9). Here the Petitioners assert that the Ninth Circuit retreated from what they characterize as the firm purpose test and upheld the enforcement of a summons despite a recommendation for prosecution that had been forwarded to the Regional Counsel of the Internal Revenue Service.

The portion of the opinion to which the Petitioners directed the Court dealt with the question of which recommendation for prosecution is the operative recommendation under *Donaldson*. This was not an issue in any of the decisions which Petitioners seek to contrast with *Hodge and Zweig*. The opinion in *Hodge and Zweig* not only is consistent with the *Weingarden* and *Wall* opinions, but with the instant opinion from which the Petitioners seek to appeal.

> Appellants charge that the summons in this case was not issued in good faith and that its sole purpose was to aid the unrelated criminal prosecution for narcotics violations. They conclude, therefore, that the district court should have refused to enforce the summons under *Donaldson*. The district court specifically found, however, that "the summons was issued in the ordinary course of an investigation of Sandino to determine his tax liability," and therefore not for the sole purpose of assisting in the criminal investigation. We cannot conclude that this determination was clearly erroneous. (548 F. 2d at 1351)

In further support of their contention that the courts of appeals have made inconsistent findings with respect to the issue at hand, the Petitioners cite the court to *United States* v. *Billingsley*, 469 F. 2d 1208 (C. A. 10). A reading of *Billingsley* discloses that the opinion was in accord with the finding in *Hodge and Zweig* that the operative recommendation referred to in the *Donaldson* opinion is the recommendation by the Internal Revenue Service to the Department of Justice.

Further, the court in *Billingsley*, after citing the *dictum* in *Reisman* indicating that a summons properly may not be used to gather information solely in aid of a criminal prosecution, stated:

> The instant case is not unique and the evidence demonstrates that the Service's investigation of Mills was both civil and criminal in nature. (469 F. 2d at 1210)

It is clear that the alleged confusion of the lower courts with respect to the issue at hand exists only in the minds of the Petitioners. As the court in *Billingsley* stated,

> The Court in Donaldson recognized that the courts of appeals have uniformly approved "the use of a summons in an investigation that is likely to lead to civil liability, as well as to criminal prosecution". (Citations omitted) (*id.* at 1209)

Then the Court in applying this Court's decision in *Donaldson* held:

> The Court then sanctioned the use of a Section 7602 summons in an investigation with both civil and criminal aspects by stating that the *Reisman dictum* referred to the situation "where the sole object of the investigation is to gather data for criminal prosecution *Donaldson* v. *United States, supra,* at 533." (Other citations omitted) 469 F. 2d at 1209.

It would appear that the Petitioners seek to foster that which they ask this court to resolve, *i.e.* "disarray among the circuits." It is apparent, even from the cases cited by the Petitioners, that the circuits uniformly have adhered to the rule that a summons may not be issued solely in aid of a criminal investigation.

e. The Petitioners assert that "[t]he fundamental error of the court of appeals was its assumption that a special agent's investigatory activities are solely for criminal purposes so that his issuance of a summons to obtain evidence of criminal tax violations is a quintessential example of bad faith. (Pet. p. 10)

The court of appeals never assumed that a special agent's investigatory activities are solely for criminal purposes. Rather, the court below reviewed the district court's finding of sole criminal purpose in the issuance of the summons and refused to reverse that finding on the bases not only that it was supported adequately by the record below, but that the court was "not left with a firm and definite conviction that mistake [sic] had been made." (App. B. p. 9a)

The Petitioners then argue that the general organizational divisions within the Internal Revenue Service and various provisions contained in the Internal Revenue Service Manuals establish the joint nature of the investigation herein.

In addition, the Petitioners seek to avoid the specific findings below through their assertion that the duties and responsibilities of special agents generally include certain audit functions.

That these in fact may be among the duties and responsibilities of a special agent does not lead inescapably to the conclusion that every investigation conducted by a special agent is in furtherance of those responsibilities. If the Petitioners' assertions are valid, courts could dispense with any hearing or in-

quiry with respect to these summonses, merely judicially notice these duties and responsibilities, and enforce each and every summons brought before them.

As the court below stated in response to this argument,

> We think that the Government oversimplifies the evidentiary posture of the case. Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him. (App. B p. 15a)

f. The Petitioners then argue that the *dicta* in both *Donaldson* and *Reisman*, when construed together, indicate that, for a summons to be issued solely for criminal purposes, it must be established that it was issued only after a recommendation for prosecution. This argument obfuscates the issue before this Court. Here the district court made a finding of fact that the summonses had been issued solely in aid of a criminal investigation. The logical consequence of the Petitioners' argument is that no matter what the evidentiary posture or testimony may be, a court never may make such a finding of fact unless a recommendation for prosecution has preceded the issuance of the contested summons.

If the Petitioners' arguments are meritorious, the purpose for any adversary hearing or examination of the agent, beyond establishing whether a recommendation for prosecution has been made, is inexplicable.

The Petitioners suggest that the court below gave undue emphasis to one portion of the *Reisman dictum*. It is not the court which emphasizes one phrase of the *Reisman dictum* over another, as asserted, but, rather, the Petitioners, who emphasize the phrase "pending criminal charge" and would ignore in their advocacy the phrase "an investigation solely for criminal purposes" *Donaldson* v. *U. S., supra,* at 533, citing *Reisman* v. *Caplin, supra,* at 449.

Once again it appears that the Petitioners seek to create confusion where none exists. To suggest that a special agent properly may conduct a simultaneous investigation of both the

civil and criminal aspects of any given situation does not avoid the finding below, wherein the court refused to enforce a summons which it found to have been issued solely in aid of a criminal investigation.

g. The Respondents agree with the Petitioners assertion that the decision below threatens to impair the enforcement of summonses issued solely in aid of a criminal investigation. However, the extent to which such a denial may limit the power of Internal Revenue Service not only is acceptable, but constitutionally required. The Internal Revenue Service's interest in enforcing the Internal Revenue laws is not without constitutional and judicial limitation.

The Petitioners interpret the court of appeals' ruling to hold that the subjective motive of an agent may be taken into account in determining whether a summons is issued in good faith. The Respondents contend that such an assertion begs the question before this court. The evidence below established not the motive of the agent, but, rather, the purpose for the issuance of the summons. The courts, and particularly the court below, have not departed from the line of demarcation established in *Donaldson*. Instead the standards as enunciated therein have been followed consistently: "we hold under § 7602 an internal summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." 400 U. S. at 536.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

No. 75 C 3842

THE UNITED STATES OF AMERICA and JOHN F. OLIVERO,
Special Agent, Internal Revenue Service,
Petitioners,

v.

LA SALLE NATIONAL BANK, JOSEPH W. LANG, Vice President
of LaSalle National Bank,
Respondents.

MEMORANDUM OPINION AND ORDER

The United States of America and John F. Olivero, Special Agent, Internal Revenue Service, as petitioners, have asked the Court to judicially enforce two Internal Revenue summonses served upon the respondent, La Salle National Bank.

At a hearing on the petition, the evidence established that, at the time of the issuance of the summonses, Special Agent John F. Olivero was assigned to the investigation of possible tax liabilities of one John Gattuso, that his investigation had not been completed, and that he had made neither a preliminary investigative report nor a recommendation for criminal prosecution. Agent Olivero testified that he had not yet determined whether to recommend criminal prosecution in the case.

Respondents contend that Special Agent Olivero was in fact conducting an investigation of criminal violations of the Internal Revenue Code by John Gattuso and that, under these circumstances, utilization of an Internal Revenue summons to obtain evidence was an abuse of this summons. The evidence further revealed that Special Agent Olivero was the only agent assigned to this investigation and that no revenue agent was working in conjunction with him.

The Court recognizes that civil and criminal investigations may go forward side by side before a determination of the ultimate focus of the investigation is made. The Court recognizes further that the presence of a special agent assigned to the investigation does not automatically make it a criminal investigation.

It is an improper use of an Internal Revenue summons to serve it solely for the purpose of obtaining evidence for use in a criminal prosecution. *Reisman* v. *Caplin,* 375 U. S. 440 (1964). On the other hand, it is not an improper use of an Internal Revenue summons to issue it in aid of an investigation, if the issuance is prior to a recommendation for criminal prosecution and in good faith. *Donaldson* v. *United States,* 400 U. S. 517 (1971).

The recommendation for criminal prosecution is certainly the event which definitely determines the focus of the Internal Revenue Service upon criminal prosecution as the end and goal of its investigation. It is apparent, however, that this focus and determination may be arrived at, under certain circumstances, before the actual recommendation for criminal prosecution has been made. In the event such focus and determination has been arrived at at the time of the issuance of the Internal Revenue summons, the fact that it precedes the formal recommendation for criminal prosecution is not relevant. An Internal Revenue summons under such circumstances is not issued in good faith.

The Supreme Court in the *Donaldson* case, *supra,* leaves no doubt that it regards as inappropriate the issuance of an Internal

Revenue summons in an ". . . investigation solely for criminal purposes." *Donaldson* v. *United States,* 400 U. S. 517, at 533.

It is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso.

Therefore the petition of The United States of America and John F. Olivero, Special Agent of the Internal Revenue Service, for the enforcement of Internal Revenue summonses served upon the respondent, La Salle National Bank, is denied.

ENTER:

/s/ FRANK J. McGARR,
FRANK J. McGARR,
United States District Judge.

Dated: March 9, 1976

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 76-1572

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent of the Internal Revenue Service,

Petitioners-Appellants,

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of the LaSalle National Bank,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 75-C-3842—FRANK J. MCGARR, *Judge*

Argued January 6, 1977—Decided April 11, 1977

Before PELL and SPRECHER, *Circuit Judges,* and EAST, *Senior District Judge.**

PELL, *Circuit Judge.* This is an appeal from an order of the district court entered on March 9, 1976, denying enforcement

* Senior District Judge William G. East of the United States District Court for the District of Oregon is sitting by designation.

of two IRS summonses served upon the LaSalle National Bank and its vice-president, Joseph W. Lang. The issue presented is whether the district court erred in finding that the two summonses were issued in aid of an investigation solely for criminal purposes and were unenforceable for that reason.

I.

Special Agent John F. Olivero was conducting an investigation of the federal tax liabilities of John Gattuso. On August 15, 1975, petitioner Olivero issued the instant summonses, directing the respondent LaSalle National Bank to appear before him on September 2, 1975, to testify and to produce for examination certain books, records, and papers. Respondent Lang appeared in response to the summonses but failed to testify or produce the records demanded.

On November 11, 1975, the United States and Special Agent Olivero petition the district court for enforcement of the summonses pursuant to 26 U. S. C. §§ 7402(b), 7604(a).[1] The petition prayed, *inter alia,* for an order directing the respondents to show cause why they should not comply with and obey the aforementioned summonses in each and every requirement thereof. The district court issued the order to show cause pursuant to which a hearing was held on December 5, 1975.

1. 26 U. S. C. § 7402(b) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U. S. § 7604(a) provides:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which said person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

At the hearing, Special Agent Olivero reiterated under repeated questioning that he was attempting to determine whether or not there were any criminal violations of the Internal Revenue Code. He also testified that the purpose of his investigation was "to determine the tax liabilities for the years under investigation." In response to a direct question from the court, Olivero stated that he had not made a determination in his own mind as to whether to recommend criminal prosecution. The agent could not recall specifically reading Section 539 of the Handbook for Special Agents of the Intelligence Division, but admitted in response to another question from the court that he had not kept a chronological work sheet in connection with his investigation of the tax liability of John Gattuso. He could not recall whether he had seen any or all of the documents demanded from the respondent by the summonses.

The respondents called Olivero and Gregory J. Perry as witnesses. Respondents had served a subpoena upon Olivero seeking all files concerning or relating to Gattuso but excused the agent after the district court judge indicated that respondents had not yet sustained the burden of raising a substantial question concerning the validity of the summonses. The judge indicated that he would examine the records in camera if the respondents' presentation of their case suggested that the records should be inspected. Thereupon, the respondents called Perry, who testified that he had asked Olivero at a meeting of June 11, 1975, what civil aspect of the investigation Olivero was getting into. When Olivero said "his investigation was strictly related to criminal violations" of the Internal Revenue Code but would not disclose them, the meeting quickly came to a close. Perry testified that he asked Olivero whether there was any Revenue Agent or officer assigned to the case with him and that Olivero said "no, strictly a criminal investigation."

After hearing testimony, the court stated that it had heard nothing in Agent Olivero's testimony to suggest that the thought of a civil investigation ever crossed his mind. The judge indicated that he would undertake the in camera inspection of the materials in the file in view of his understanding that if there was a possibility that information regarding civil tax liability might come up, it was a civil investigation until Olivero closed it. The judge also observed that unless he found something in the camera inspection that gave more support to the Government's position than did Olivero's testimony, it would be the court's conclusion that Olivero was at all times involved in a criminal investigation, at least in Olivero's mind.

After considering the in camera material, the testimony, and various memoranda submitted by the parties, the district court denied enforcement of the summonses. In its Memorandum Opinion and Order, the district court recognized that it was not an improper use of an IRS summons to issue it in aid of an investigation if the issuance was prior to a recommendation for criminal prosecution and in good faith, citing *Donaldson* v. *United States*, 400 U. S. 517 (1971). The court further recognized that civil and criminal investigations might go forward side by side before a determination of the ultimate focus of the investigation was made. Again, the court recognized that the presence of a Special Agent assigned to the investigation did not automatically make it a criminal investigation. After noting that the Supreme Court in *Donaldson, supra*, had left no doubt that it regarded as inappropriate the issuance of an IRS summons solely for criminal purposes, the court stated:

> It is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso.

Believing that the district court had either clearly erred in this finding of fact or had acted out of a mistaken view of the law, the United States filed a notice of appeal on May 7, 1976.

II.

The first question in this case concerns our scope of review. Although the district court judge's statement that Olivero was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct was not formally labelled as either a finding of fact or a conclusion of law, we think that it must be regarded as a finding of fact. The district court judge reviewed the testimony of the two witnesses, and his performance of this function must be considered that of a fact finder.

In *United States* v. *National State Bank*, 454 F. 2d 1249, 1252 (7th Cir. 1972), we recognized that the rule of *Donaldson* v. *United States*, 400 U. S. 517, 536 (1971), validated IRS summonses when issued "in good faith and prior to a recommendation for criminal prosecution." There, the district court had granted enforcement. In affirming that judgment, we characterized the essence of the district court's decision as factual findings that the summons there challenged had been "issued in an investigation of civil liability with a possibility of criminal prosecution but with no criminal prosecuton pendng, and was accordingly issued in good faith." *Id.* We determined that "[t]he record justified the [district] court's finding of those facts." *Id.* Thus, this court has ruled that a finding as to good faith is a factual finding the review of which is controlled by the clearly erroneous standard of Rule 52(a), Fed. R. Civ. P.

Technically, *National State Bank, supra,* does not speak to the question of whether a converse determination is exactly analogous. In their main brief, the petitioners contend that a finding of sole criminal purpose is either a mixed finding of fact and conclusion of law or a finding of ultimate fact which involves the application of legal principles. The petitioners cite *United States* v. *Weingarden*, 473 F. 2d 454, 460 (6th Cir. 1973), as authority for the proposition that, in either case, it is reviewable as a matter of law. In their reply brief, the petitioners shift position. Apparently guided in part by the respondents'

vigorous argument that no other reported case holds that a finding such as that made in the instant case is not a finding of fact, the petitioners concede that *United States* v. *Cleveland Trust Company*, 474 F. 2d 1234, 1236 (6th Cir. 1973), *cert. denied sub nom. Miceli* v. *United States*, 414 U. S. 866; and *United States* v. *Zack*, 521 F. 2d 1366, 1369 (9th Cir. 1975), point to an opposite conclusion from that of *Weingarden*. The petitioners now argue that resolution of the question is a false issue in the case, inasmuch as it was quite clear that an improper legal test was applied in making a finding of sole criminal purpose.

We are not persuaded that an improper legal test was applied, and thus we cannot so simply evade the question. We hold that the clearly erroneous standard go' rns review of findings that an IRS summons has or has not issued in good faith. Assuming arguendo that the Supreme Court has not overruled or qualified *Donaldson* in its more recent adjudications, there is ample support in the record for the district court's finding of sole criminal purpose. The record establishes that Olivero testified to the existence of a civil purpose but that the district court, who observed the demeanor of the witnesses, discredited that testimony. We are not left with a firm and definite conviction that mistake has been made.

III.

The second question in this appeal is whether the district court applied the proper legal test in making its finding of fact. The reported cases establish that the various circuits, including our own, have formulated several distinct standards for quashing a summons issued under 26 U. S. C. § 7602.

The major problem in determining the proper legal test arises from the language of the *Donaldson* opinion. In the thirty-fourth paragraph of the decision, 400 U. S. at 533, the Supreme Court stated that the dictum of *Reisman* v. *Caplin*, 375 U. S.

440 (1964)[2], comes into proper focus as applicable "to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes." However, the *Donaldson* opinion used different language in the thirty-eighth and last paragraph, 400 U. S. at 536, where it stated:

> We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

Subsequent to *Donaldson*, the courts of appeals have devoted considerable intellectual energy to the analysis of its language. Usually, the Government has argued that the single standard for determining the validity of an IRS summons is the recommendation for prosecution" standard. Although some cases have appeared to accept that position, *e.g.*, *National State Bank*, *supra* at 1252, the more recent decisions have highlighted the role of *Donaldson's* "good faith" language.

In *Weingarden*, *supra*, the Sixth Circuit noted that the formulation of the standard which authoring Justice Blackmun prefaced with the words "We hold" was technically dictum. 473 F. 2d at 460. *Accord*, *United States* v. *McCarthy*, 514 F. 2d 368, 374 n. 7 (3d Cir. 1975); *United States* v. *Lafko*, 520 F. 2d 622, 625 n. 5 (3d Cir. 1975). *See also United States* v. *Friedman*, 532 F. 2d 928, 932 (3d Cir. 1976). Thus, the *Weingarden* court relied instead on the *Donaldson* paragraph relating to the *Reisman* dictum, ruling that "[t]he standard is whether the sole purpose of the issuance of the summons is for criminal prosecution." 473 F. 2d at 460.

2. The *Donaldson* opinion, 400 U. S. at 532, identified the following passage from *Reisman*, supra at 449, as dictum, referring to it thereafter as "the *Reisman* dictum":

> [T]he witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren* v. *Tucker*, 239 F. 2d 767, 772-773, as well as that it is protected by the attorney-client privilege.

In *United States* v. *Wall Corporation*, 475 F. 2d 893, 895 (D. C. Cir. 1972), the court, after setting forth the *Donaldson* paragraph dealing with the Supreme Court's "holding," stated that inquiry was not ended upon a determination that prosecution had neither been instigated nor recommended. The rationale for probing beyond mere "recommendation for prosecution" was that *Donaldson* also required that a summons be issued in "good faith." The *Wall* court stated that if it could be shown that the investigating agent had already formed a firm purpose to recommend criminal prosecution, even though he had not as yet made a formal recommendation, issuance of the summons would presumably be in bad faith. 475 F. 2d at 895.

In *McCarthy*, *supra* at 373-75, the Third Circuit reviewed the precedents applicable to the "criminal purpose defense" recognized in *Reisman*, *supra*, and the "good faith" defense discussed in *Wall*, *supra*.[3] As to the first, it observed that the defendants had not alleged that a recommendation for criminal prosecution had been made prior to the issuance of the summons. Accordingly, it ruled that the defendants' allegations were insufficient to bring the matter on unenforceability on the grounds of criminal purpose into controversy. 514 F. 2d at 374. As to the latter, it determined that the defendants' allegations sufficiently raised the possibility that the IRS agents had no intention of pursuing any civil remedies as to bring into question their good faith. *Id.* at 375. Accordingly, it held that the district court should conduct a hearing concerning the issues raised by the allegations of the absence of civil purpose.

More recently, the Third Circuit has apparently retreated from an effort to approach *Donaldson* through an analysis

3. *McCarthy* declined to follow *Weingarden*, *supra*, which it read as holding that *Donaldson* could be read as promoting the "solely for criminal purposes" test and not the "recommendation for prosecution" test. At the same time, however, *McCarthy* stated that the portion of the *Donaldson* opinion found in the last paragraph of Justice Blackmun's opinion for the court was, technically speaking, mere dictum. *See* 514 F. 2d at 374 n. 7.

distinguishing its holding from its supposed dictum. In *Friedman, supra,* 532 F. 2d at 932, the court stated that the standards for judicial enforcement of a § 7602 summons were found in *Donaldson,* and explained in *McCarthy, supra,* and even more recently, in *Lafko, supra.* The *Friedman* opinion explains that these cases recognize that the IRS has no authority to conduct a criminal investigation through the use of a § 7602 civil summons, noting that no court has given a thorough or persuasive justification for this construction. 532 F. 2d at 932 n. 9. The *Friedman* case recognizes that *Donaldson* and the Third Circuit cases hold that the mere fact that criminal as well as civil liability may result will not prevent judicial enforcement if (1) the Intelligence Division has not yet recommended prosecution, (2) the agent has not already formed a firm purpose to recommend prosecution, (3) the summons is not being used to harass the taxpayer, and (4) the material referred to in the summons has not already been inspected by the Government. *Id.* at 932.

The *Friedman* formulation of a four-prong basis for denying enforcement of an IRS summons represents a careful articulation of the principles gleaned from the many cases considering the validity of particular summonses. As an a *priori* approach, its analysis has much to recommend it. However, we can hardly fail to note that the *Friedman* analysis sedulously avoids any use of the phrase "in good faith," substituting instead a reformulation which sets forth the circumstances under which denial of enforcement is proper. Instead of attempting exegesis of the language of *Donaldson,* the *Friedman* case traces the contours of precedent back to the original formulation of a rationale by Judge Wyzanski in *United States* v. *O'Connor,* 118 F. Supp. 248 (D. Mass. 1953).

The Ninth Circuit has taken a different approach. In *United States* v. *Zack, supra,* 521 F. 2d 1366, the court reviewed a district court order denying enforcement of an IRS summons. The lower court had conducted a hearing and made a finding of fact that the investigation's sole purpose was to establish criminal

liability. Upon the Government's appeal, the court followed *Weingarden's* ruling, 473 F. 2d at 460, that an IRS summons, if issued solely for criminal purposes is not issued in good faith, even though there has been no recommendation for prosecution. Thus, *Zack* determined that indictment or recommendation of criminal prosecution was not a prerequisite to a finding that an investigation is solely criminal. 521 F. 2d at 1368.

Significantly, *Zack* again found it necessary to reconcile the various passages in the *Donaldson* opinion. After directing attention to that portion of the opinion discussing the *Reisman* dictum, *see* 400 U. S. at 533, *Zack* turned to the last, "holding" paragraph. It concluded that even prior to a recommendation for criminal prosecution, an administrative summons should not be enforced unless it is issued in good faith. The court explained, *supra* at 1368:

> We harmonize this "good faith" requirement with the language disapproving the use of the summons in "an investigation solely for criminal purposes" by concluding that the government would not be in good faith if it uses an administrative summons solely for criminal prosecution purposes. Thus, in this case, if the administrative summons was used solely for criminal purposes, it is not issued in good faith and is impermissible. This is true even though there has been no recommendation for prosecution.

In carrying out its hermeneutical task, the *Zack* court took no position on the characterization of the concluding *Donaldson* paragraph as holding or dictum.

A review of the cases from other circuits establishes to our satisfaction that the *Donaldson* opinion has engendered some confusion. Accordingly, we shall take at face value the words of the authoring Justice and characterize the final paragraph of the opinion for the court as constituting a holding of *Donaldson.*[4]

4. The courts have characterized the final paragraph as mere dictum because the Supreme Court did not have to rule on the sufficiency of the taxpayer's claims, one of which was the criminal purposes defense. *See, e.g., McCarthy, supra,* 514 F. 2d at 374 n. 7.

(Footnote continued on next page)

Thus, it is proper for a district court to grant enforcement of an IRS summons if it is issued in good faith and prior to a recommendation for criminal prosecution. Conversely, if a summons is issued in bad faith or after a recommendation for prosecution, enforcement must be denied[5].

We agree with the respondents that the petitioners' arguments ignore the good faith requirement of *Donaldson*. We further agree that the real issue before the court is whether the Internal Revenue Service may issue a summons solely in aid of a criminal investigation and still meet the standard of good faith as enunicated in *Donaldson*. Because we are persuaded that *Zack's* reconciliation of the various *Donaldson* paragraphs accurately delineates what the Supreme Court has held, we must reject the petitioners' arguments.

The Government insists that there was no evidence that Special Agent Olivero was not simultaneously pursuing a civil investigation. Reading the record evidence in this fashion, the petitioners submit that it is clear that the special agent's investigation encompassed the purpose of determining the taxpayer's tax liability. Suggesting that the district court misfocused its inquiry, the petitioners insist that the only relevant inquiry is whether the investigation in aid of which the summons is issued is directed at least in part toward determining the liability of some person

(Footnote continued from preceding page.)
However, the Supreme Court was perfectly aware that its holding that the taxpayer's interest was not of sufficient magnitude to support intervention effectively disposed of the case. In *Donaldson, supra* at 531, the authorizing Justice states, prior to Part VII's resolution of Donaldson's arguments, that "[t]his conclusion [*i.e.*, insufficient interest to support intervention] could dispose of the case, for our *main concern* here is with the taxpayer's asserted right to intervention in the particular enforcement proceedings." (Emphasis supplied.) That the Court went on to examine its *Reisman* dictum appears to us an intentional formulation of an alternative holding.

5. Although our prior cases of *United States* v. *Turner*, 480 F. 2d 272 (7th Cir. 1973); and *United States* v. *Awerkamp*, 497 F. 2d 832 (7th Cir. 1974), use different phraseology, they are consistent with this interpretation of *Donaldson*.

for an internal revenue tax.[6] The Government argues that once it is demonstrated that there is nothing unusual or sinister about the special agent focusing his attention on the criminal aspects of the case, the finding of sole criminal purpose must fall.

We think that the Government oversimplifies the evidentiary posture of the case. Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him.

We note that the district court expressly observed the *bona fides* of the investigation was in issue. The Government attempts to use the district court's statement as an indication that it applied the wrong legal test. Our reading of the reported cases persuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith. In view of our reading of the crucial language in *Donaldson, see* 400 U. S. at 536, we read the statement as a faithful reflection of that decision's alternative holding.

We have examined subsequent Supreme Court decisions, such as *Couch* v. *United States*, 409 U. S. 322 (1973); *Beckwith* v. *United States*, 425 U. S. 341 (1976); and *Fisher* v. *United States*, 425 U. S. 391 (1976). Although those cases establish that a taxpayer is clearly the "focus" of a criminal investigation when the matter is assigned to the Intelligence Division of the Internal Revenue Service, they do not reflect in our reading of them any intent of the Supreme Court to qualify or cut back its holding in *Donaldson, supra* at 536. Accordingly, the "bad faith" test spelled out by that decision is controlling law.

We note that the district court formulated its factual finding by use of the expression "sole criminal purpose" rather than by

6. In their main brief, the petitioners state that "[i]t is the government's position that a summons may be used solely for the purpose of criminal investigation at any time prior to the final recommendation for criminal prosecution." They found it unnecessary to advance the argument because of their view that the evidence in this case clearly established that the special agent's investigation encompassed a civil aspect.

a label such as "bad faith." We find no basis for reversible error in that verbal formulation. The district court grasped the vital core of *Donaldson* and rendered its factual finding consistently therewith. Accordingly, its order denying enforcement of the two IRS summonses is

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

Opinion by Judge Pell

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 76-1572

April 11, 1977

Before

HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON WILLIAM G. EAST, *Senior District Judge**

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent of the Internal Revenue Service,

Petitioners-Appellants,

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of the LaSalle National Bank,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 75-C-3842

FRANK J. MCGARR, *Judge*

* Honorable William G. East, Senior Judge, United States District Court for the District of Oregon, sitting by designation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

Supreme Court, U. S.
FILED
NOV 19 1977
MICHAEL RODAK, JR., CLERK

No. 77-365

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

LASALLE NATIONAL BANK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

WADE H. MCCREE, JR.,
Solicitor General,
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Washington, D.C. 20530.

In the Supreme Court of the United States

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---

1. Respondents (Br. in Opp. 13-14) attempt to reconcile the decision below with *Donaldson* v. *United States*, 400 U.S. 517, by arguing that this case turned on the testimonial credibility of the special agent who issued the summonses. In support of this contention, they cite the statement of the court of appeals that "Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him" (Pet. App. p. 18a). In the court of appeals' view, "the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith" (Pet. App. B, p. 19a).

But the refusal of the courts below to enforce the summonses issued prior to a recommendation for criminal prosecution cannot be reduced to a question of the credibility of the special agent. In *Donaldson* v. *United*

States, supra, 400 U.S. at 536, this Court held that "under §7602 [of the Internal Revenue Code] an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."[1] As the Court there recognized, there is no valid distinction between a civil and a criminal investigation for purposes of the enforceability of an internal revenue summons. The critical distinction established by *Donaldson* is between a summons issued before the Internal Revenue Service has recommended criminal prosecution to the Department of Justice and a summons issued after such a recommendation.

Thus, there was no occasion for the district court to reject the credibility of the special agent's testimony that there were civil aspects to his investigation. The Internal Revenue Service is the agency charged with the administration and enforcement of the tax laws (see 26 U.S.C. 7801) and every investigation, whether it is conducted by special agents or revenue agents, has as one of its purposes the collection of revenue. Since the Internal Revenue Service had not recommended prosecution of any individual prior to the special agent's issuance of the summons, "the civil aspects [of the investigation] * * * [were] inextricably associated with the criminal." *United States* v. *Billingsley,* 469 F. 2d 1208, 1210 (C.A. 10). Under the objective standard of *Donaldson,* the summonses were therefore enforceable even though the special agent might uncover evidence of criminal conduct.

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[1]In our petition (p. 6), we inadvertently omitted the phrase "in aid of an investigation" from the quotation of the *Donaldson* holding. Although respondents argue (Br. in Opp. 7) that the omission was "crucial to the context and meaning of the quoted language," we do not believe that it affects our argument that the court of appeals misapplied the *Donaldson* standard.

2. The language of Section 7602 and its legislative history confirm that Congress intended that an internal revenue summons could be issued in aid of a tax fraud investigation without requiring any appraisal of the relative weight of the civil and criminal aspects of the investigation. "There is nothing in the language of § 7602 to limit the issuance of summonses to civil investigations." *Donaldson* v. *United States, supra,* 400 U.S. at 537 (Douglas, J., concurring). Moreover, Section 3654 of the 1939 Code, a statutory predecessor of Section 7602, provided that "every collector * * * shall aid in the prevention, detection, and punishment of any frauds * * *. For such purposes, he shall have the power * * * to summon any person to produce books and papers."[2] Upon reenacting the summons power in Section 7602 of the 1954 Code, the responsible committees stated that Congress intended "no material change from existing law." H.R. Rep. No. 1337, 83d Cong., 2d Sess., p. A436 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 617 (1954).

There is accordingly no basis for the court of appeals' conclusion that special agent Olivero "was at all times involved in a criminal investigation, at least in Olivero's mind" (Pet. App. B, p. 8a). Under *Donaldson,* the subjective intent of the agent issuing a summons prior to a recommendation for prosecution is irrelevant because his inquiry necessarily involves questions of civil tax liability. Thus, in a summons enforcement proceeding, the summons will meet the *Donaldson* standard if the Commissioner shows "that the investigation will be

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[2]This statute was derived from an essentially identical provision first enacted in 1868. Act of July 20, 1868, c. 186, 15 Stat. 125, 144, Sec. 49, and codified as part of Section 3163 of the Revised Statutes of 1874.

conducted pursuant to a legitimate [statutory] purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *United States* v. *Powell*, 379 U.S. 48, 57-58. See also *Donaldson* v. *United States, supra*, 400 U.S. at 526-527; *United States* v. *Kordel*, 397 U.S. 1, 11-12.

For the reasons stated above and in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

DOJ-1977-11

Supreme Court, U. S.
FILED
FEB 6 1978
MICHAEL RODAK, JR., CLERK

No. 77-365

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

LASALLE NATIONAL BANK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	6
Argument	10
An internal revenue summons may properly be issued to obtain third-party records in aid of an administrative investigation conducted by the Internal Revenue Service to determine whether it should recommend to the Department of Justice that a taxpayer be prosecuted for criminal tax violations	10
A. The Internal Revenue Service is broadly authorized to issue summonses in aid of tax investigations prior to recommendation of criminal prosecution	10
B. The civil and criminal elements of tax investigation are necessarily intertwined	15
C. The language and legislative history of Section 7602 confirm that Congress has authorized the use of an internal revenue summons in investigating what may prove to be criminal conduct	20

254-928—78——1

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Argument—Continued
D. This Court's decision in *Donaldson* v. *United States*, 400 U.S. 517, controls this case 29
Conclusion 36
Appendix 1a

CITATIONS

Cases:
Couch v. *United States*, 409 U.S. 322 ..... 12, 14, 19, 30
Donaldson v. *United States*, 400 U.S. 517 ..... *passim*
Fisher v. *United States*, 425 U.S. 391 12
Meador, In re, 16 Fed. Cas. 1294 28
Reisman v. *Caplin*, 375 U.S. 440 ..... 12, 30
Stanwood v. *Green*, 22 Fed. Cas. 1077 28
United States v. *Billingsley*, 469 F. 2d 1208 ..... 19, 34, 36
United States v. *Bisceglia*, 420 U.S. 141 12
United States v. *Hodge and Zweig*, 548 F. 2d 36
United States v. *Kordel*, 397 U.S. 1 ..... 12, 35
United States v. *Lafko*, 520 F. 2d 622 36
United States v. *McCarthy*, 514 F. 2d 368 35
United States v. *Miller*, 425 U.S. 435 14
United States v. *O'Connor*, 118 F. Supp. 248 33
United States v. *Powell*, 379 U.S. 48 ..... 9, 13, 32, 35
United States v. *Troupe*, 438 F. 2d 117 36
United States v. *Wall Corp.*, 475 F. 2d 893 35
United States v. *Weingarden*, 473 F. 2d 454 35
United States v. *Zack*, 521 F. 2d 1366 36
Statutes and regulation:
Act of June 30, 1864, 13 Stat. 223 *et seq.*:
Section 14 ..... 23, 25
Section 15 25

Statutes and regulations—Continued
Act of July 13, 1866, Section 9, 14 Stat. 98, 101 25
Act of July 20, 1868, Section 49, 15 Stat. 125, 144 ..... 23, 26, 27
Act of December 24, 1872, Section 1, 17 Stat. 401 ..... 23, 25
Act of August 15, 1876, 19 Stat. 143, 152 ..... 23, 27
Act of March 1, 1879, 20 Stat. 327 *et seq.*:
Section 2 27
Section 3 25
Act of August 27, 1894, Section 34, 28 Stat. 509, 557–559 25
Act of October 3, 1913, Section II(I), 38 Stat. 114, 177–179 25
Act of September 8, 1916, Section 16, 39 Stat. 756, 773–774 25
Act of February 24, 1919, 40 Stat. 1057 *et seq.*:
Section 1305 23
Section 1317 25
Act of November 23, 1921, 42 Stat. 227 *et seq.*:
Section 1308 23
Section 1311 25
Act of June 2, 1924, 43 Stat. 253 *et seq.*:
Section 1004 23
Section 1018 25
Act of February 26, 1926, 44 Stat. (Part 2) 9 *et seq.*:
Section 1104 23
Section 1115 25
Act of May 29, 1928, Section 618, 45 Stat. 791, 878 23
Internal Revenue Code of 1939 (26 U.S.C.):
Section 3614 ..... 21, 28

Statutes and regulations—Continued

	Page
Section 3614(a)	22
Section 3615	25
Section 3615(a)–(c)	21, 23, 26, 28
Section 3616	25
Section 3654	8, 21, 26, 27
Section 3654(a)	26, 27
Internal Revenue Code of 1954 (26 U.S.C.):	
Section 6653(b)	17, 21
Section 6659(a)(2)	21
Section 7122	2, 1A
Section 7122(a)	19
Section 7201	21
Section 7206	21
Section 7601	2, 11, 12, 1A
Section 7602	*passim*
Section 7604	2, 3A
Section 7604(a)	3
Section 7608	2, 3A
Section 7801	2, 11, 33, 3A
Section 7801(a)	7, 16
53 Stat. (Part I) XLII	27
68A Stat. 969	21, 26
Reorganization Act of 1949, 63 Stat. 203	23
Rev. Stat. of 1873–1874 § 3163	27
26 C.F.R. 601, 107(a)	17
Miscellaneous:	
1976 Annual Report of the Commissioner of Internal Revenue	20
65 Cong. Globe, 38th Cong., 1st Sess. (1864)	25

Miscellaneous—Continued

	Page
66 Cong. Globe, 38th Cong., 1st Sess. (1864)	25
7 Cong. Rec. 3920–3924 (1878)	27
100 Cong. Rec. 3425 (1954)	22
Delegation Order No. 4 (Rev.) (22 Fed. Reg. 3894)	23
H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954)	9, 21
Internal Revenue Service Organization and Functions:	
§ 1113.563, 39 Fed. Reg. 11572, 11581	16
§ 1114.8, 39 Fed. Reg. 11601	16–17
§ 1114.82, 39 Fed. Reg. 11601	17
§ 1118.6, 39 Fed. Reg. 11607	17
Reorganization Plan No. 26 of 1950 (15 Fed. Reg. 4935)	23
Reorganization Plan No. 1 of 1952 (17 Fed. Reg. 2243)	23
S. Rep. No. 20, 76th Cong., 1st Sess. (1939)	22
S. Rep. No. 1622, 83d Cong., 2d Sess. (1954)	9, 22

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion and order of the district court (Pet. App. A, pp. 1a–3a) are not officially reported. The opinion of the court of appeals (Pet. App. B, pp. 4a–20a) is reported at 554 F. 2d 302.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, pp. 21a–22a) was entered on April 11, 1977. By order dated July 1, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 8, 1977. The petition for a

writ of certiorari was filed on September 6, 1977, and was granted on December 12, 1977 (A. 92). The jurisdiction of the Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an internal revenue summons may properly be issued to obtain third-party records in aid of an administrative investigation conducted by the Internal Revenue Service to determine whether it should recommend to the Department of Justice that a taxpayer be prosecuted for criminal tax violations.

STATUTES INVOLVED

The pertinent provisions of Sections 7122, 7402(b), 7601, 7602, 7604, 7608 and 7801 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in the Appendix, *infra,* pp. 1A–4A.

STATEMENT

1. Special Agent John F. Olivero of the Intelligence Division of the Internal Revenue Service issued two summonses to respondents LaSalle National Bank and Joseph W. Lang, one of its vice-presidents, to compel testimony and the production of books and records in connection with his investigation of the federal income tax returns of John Gattuso for the years 1970–1972 (Pet. App. B, pp. 5a–6a; A. 26–27). These summonses were issued pursuant to 26 U.S.C. 7602, which authorizes the Internal Revenue Service to examine any books, papers, records, or other data, and to require testimony "[f]or the purpose of ascertaining the correctness of any return, * * * [or] determining the liability of any person for any internal revenue tax * * *" (Appendix, *infra,* p. 2A). Special Agent Olivero determined that he needed respondents' testimony and records in order to confirm the accuracy of items of rental income from real property reported on Gattuso's tax returns because the property in question was held in trust by respondent LaSalle National Bank (A. 27–28). At the time he issued the summonses, Olivero did not have the requested material within his possession. Moreover, at that time, Olivero had not completed his inquiry and had not made any preliminary investigative report or any recommendation with respect to possible criminal prosecution (Pet. App. B, p. 6a; A. 29–31, 40).

Respondent Lang, a vice-president of LaSalle National Bank, appeared before Special Agent Olivero in response to the summonses but refused to testify or to produce the records (Pet. App. B, p. 5a). Pursuant to 26 U.S.C. 7402(b) and 7604(a), the government and Special Agent Olivero then commenced this action in the United States District Court for the Northern District of Illinois to enforce the summonses (Pet. App. B, pp. 5a–6a). At a hearing, Special Agent Olivero testified that the purpose of his investigation was "[t]o determine tax liabilities for the years under investigation" (A. 26; see also A. 46). Olivero further stated that the focus of his inquiry was "[t]o investigate the possibility of criminal violations of the Internal Revenue Code" (A. 27). Finally, Olivero testified that

254-928—78——2

neither he nor the Internal Revenue Service had made a recommendation that Gattuso be prosecuted for criminal tax violations (Pet. App. B, p. 6a; A. 30–31).

At the conclusion of the hearing, the district court stated that it had "heard nothing in Agent Olivero's testimony to suggest that the thought of a civil investigation ever crossed his mind" (Pet. App. B, p. 7a). The court then indicated that it would inspect Olivero's files *in camera* to determine whether there were any civil aspects to the investigation (Pet. App. B, pp. 7a–8a; A. 62).

After such inspection, the district court denied enforcement of the summonses (Pet. App. A, pp. 1a–3a). The court stated that "[i]t is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso" (Pet. App. A, p. 3a). While the court recognized that Olivero had not recommended that Gattuso be prosecuted for criminal tax violations, it concluded that the "focus and determination" (*ibid.*) of his investigation was criminal. In the district court's view, "[a]n Internal Revenue summons under such circumstances is not issued in good faith" (*ibid.*).

2. The court of appeals affirmed (Pet. App. B, pp. 4a–20a). It held that "there is ample support in the record for the district court's finding of sole criminal purpose" (Pet. App. B, p. 11a). While the court of

appeals acknowledged that Olivero testified that his investigation had a civil purpose, it concluded that the district court discredited that testimony (*ibid.*).

In considering whether the district court applied the proper legal test, the court of appeals recognized that this Court's decision in *Donaldson* v. *United States*, 400 U.S. 517, established the governing standard for the enforcement of an Internal Revenue summons. There, the Court stated (400 U.S. at 536): "We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."

After reviewing the post-*Donaldson* decisions in the courts of appeals, the court below observed that "[t]he reported cases establish that the various circuits, including our own, have formulated several distinct standards for quashing a summons issued under 26 U.S.C. § 7602" (Pet. App. B, p. 11a). The court further noted "that the *Donaldson* opinion has engendered some confusion" (Pet. App. B, p. 16a). Having accepted the district court's finding that Olivero issued the summonses solely in aid of a criminal investigation, the court of appeals held that such summonses are unenforceable under the *Donaldson* standard because they are not issued in good faith. The court stated: "Our reading of the reported cases persuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith" (Pet. App. B, p. 19a).

SUMMARY OF ARGUMENT

A

Section 7602 of the Internal Revenue Code of 1954 authorizes the Commissioner of Internal Revenue "[t]o summon * * * any person having possession of * * * books of account containing entries relating to the business of the person liable for tax" or "[t]o take such testimony of the person * * *" "[f]or the purpose of ascertaining the correctness of any return * * *." In *Donaldson* v. *United States*, 400 U.S. 517, 536, this Court held that "under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." The Court stated that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct" (*id.* at 535). However, "where a criminal prosecution has been instituted and is pending at the time of the issuance of the summons," the Court indicated that the purpose of the summons would be improper and enforcement should be denied if "the sole objective of the investigation is to obtain evidence for use in a criminal prosecution" (*id.* at 533).

The decision below departs from the standard established by *Donaldson*. The court of appeals held that a special agent may not issue a summons for third-party records in aid of a criminal tax investigation even though there has been no recommendation for prosecution. But the distinction *Donaldson* drew

was not between civil and criminal tax investigations but between a summons issued before the Internal Revenue Service recommends criminal prosecution to the Department of Justice and a summons issued after such a recommendation. It is only in the latter situation that the summons is unenforceable. Indeed, *Donaldson* itself involved basically the same situation as the present case: the issuance of summonses seeking the production of records of third persons by a special agent of the Internal Revenue Service who was conducting an investigation to determine whether criminal prosecution should be recommended. *Donaldson* therefore controls this case.

B

1. The fundamental error of the court of appeals was its assumption that the special agent's investigatory activities were "solely for criminal purposes" so that his issuance of a summons to obtain evidence of criminal tax violations was "a quintessential example of bad faith" (Pet. App. B, p. 19a). As this Court recognized in *Donaldson* v. *United States, supra,* 400 U.S. at 534, the functions of the Internal Revenue Service cannot be so compartmentalized between civil and criminal purposes. Pursuant to its broad statutory authority to administer and enforce the internal revenue laws (26 U.S.C. 7801(a)), the Internal Revenue Service is responsible for determining and assessing tax liability and investigating criminal and civil violations of the tax laws. Thus, there was no occasion for the district

court to reject the credibility of the special agent's testimony that there were civil aspects to his investigation.

These joint responsibilities of the Internal Revenue Service were recognized in the Court's observation in *Donaldson* that the combined efforts of the audit and intelligence divisions "are directed to both civil and criminal infractions; and that any decision to recommend prosecution comes only after the investigation is complete or is sufficiently far along to support appropriate conclusions" (400 U.S. at 535). And, if there is evidence warranting recommendation of a criminal prosecution, the same evidence is also likely to result in a deficiency assessment and a civil fraud penalty. It was therefore unrealistic for the court of appeals to characterize the special agent's investigation in this case as "solely for criminal purposes" (Pet. App. B, p. 19a).

2. The broad language of Section 7602 and its legislative history confirm that Congress intended that an internal revenue summons could be issued, and should be enforced, in aid of a tax fraud investigation without requiring any appraisal of the relative weight of the civil and criminal aspects of the investigation. "There is nothing in the language of § 7602 to limit the issuance of summonses to civil investigations." *Donaldson* v. *United States, supra,* 400 U.S. at 537 (Douglas, J., concurring). Moreover, Section 3654 of the 1939 Code, one of the statutory predecessors of Section 7602, provided that "every collector * * *

shall aid in the prevention, detection, and punishment of any frauds * * *. For such purposes, he shall have the power * * * to summon any person to produce books and papers." Since the responsible legislative committees stated that they intended "no material change from existing law" at the time of the 1954 codification of the summons authority (H.R. Rep. No. 1337, 83d Cong., 2d Sess. A436 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 617 (1954)), it is plain that Congress contemplated that the summons would continue to be used to uncover evidence of criminal tax violations.

C

There is accordingly no pertinence in the court of appeals' conclusion that special agent Olivero "was at all times involved in a criminal investigation, at least in Olivero's mind" (Pet. App. B, p. 8a). Under *Donaldson,* the subjective intent of the agent issuing a summons prior to a recommendation for prosecution is irrelevant because his inquiry necessarily involves questions of civil tax liability. If a summons is issued, prior to such a recommendation, for one of the purposes enumerated in Section 7602 relating to the functions of the Internal Revenue Service and not for ulterior purposes or harassment, it will meet the "good faith" standard of *Donaldson.* See *United States* v. *Powell,* 379 U.S. 48, 57–58.

If the courts continue to depart from the line of demarcation established in *Donaldson* and engage in a search for the agent's "sole purpose" or "fixed pur-

pose," the enforceability of summonses will be subject to litigation-producing uncertainties, and summons enforcement proceedings will become mired in a host of factual details and subjective inquiries that are irrelevant to the purposes of the summons power set forth in Section 7602. The resulting delay of criminal investigations beyond the expiration of the statute of limitations would require the Internal Revenue Service, "in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution," and thereby "stultify enforcement of federal law" (*Donaldson* v. *United States, supra,* 400 U.S. at 536).

ARGUMENT

AN INTERNAL REVENUE SUMMONS MAY PROPERLY BE ISSUED TO OBTAIN THIRD-PARTY RECORDS IN AID OF AN ADMINISTRATIVE INVESTIGATION CONDUCTED BY THE INTERNAL REVENUE SERVICE TO DETERMINE WHETHER IT SHOULD RECOMMEND TO THE DEPARTMENT OF JUSTICE THAT A TAXPAYER BE PROSECUTED FOR CRIMINAL TAX VIOLATIONS

A. THE INTERNAL REVENUE SERVICE IS BROADLY AUTHORIZED TO ISSUE SUMMONSES IN AID OF TAX INVESTIGATIONS PRIOR TO RECOMMENDATION OF CRIMINAL PROSECUTION

1. This case presents a question of great importance to the enforcement of the internal revenue laws. Our self-reporting tax system is premised upon the assumption that the majority of taxpayers will honestly report their income and deductions. But Congress has

long recognized that if the Treasury is to discharge effectively its duty to administer and enforce the internal revenue laws (Section 7801 of the Internal Revenue Code), it must have statutory power to obtain information with respect to persons who may not have complied with the tax laws.

Sections 7601 and 7602 of the Code provide the Treasury with the necessary authority. The former provision imposes upon the Secretary the duty "to proceed and inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." Section 7602 authorizes the Secretary to summon the submission of records and testimony for that purpose. Specifically, as pertinent here, the statute authorizes the Secretary or his delegate "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax * * * [t]o summon * * * any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax * * *, or any person the Secretary or his delegate may deem proper, to appear * * * and to produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *."

Section 7602 is the Treasury's principal information-gathering authority, and this Court, accordingly, has broadly construed it in light of its intended pur-

254-928—78——3

pose of enabling the effective conduct of tax investigations. Indeed, the Court has repeatedly rejected attempts to circumscribe or thwart the effective exercise of the Internal Revenue summons power. See, *e.g., Couch* v. *United States*, 409 U.S. 322, 338; *Fisher* v. *United States*, 425 U.S. 391; and especially *United States* v. *Bisceglia*, 420 U.S. 141 (holding that Sections 7601 and 7602 of the Code empower the Treasury to issue a "John Doe" summons to a bank to discover the identity of a person who had engaged in certain bank transactions).

In rejecting attempts to limit the Service's summons power, moreover, the Court has specifically recognized that here, as in other areas of federal law (see, *e.g., United States* v. *Kordel*, 397 U.S. 1, 11–12 (food and drug)), there is no impropriety in proceeding with authorized civil investigations and enforcement even though there is a possibility of subsequent criminal prosecution involving the same matters. Initially, in *Reisman* v. *Caplin*, 375 U.S. 440, the Court dismissed an action, instituted by a taxpayer under investigation, for declaratory and injunctive relief against the Commissioner of Internal Revenue seeking to enjoin the enforcement of summonses issued to an accounting firm. At the time the summons was issued, the Court noted, "a criminal investigation of * * * [the taxpayer] on the tax matters was in progress" (375 U.S. at 444). Nevertheless, the Court held an injuction against the enforcement of the summons was improper because "in any of these [enforcement] proceedings before either the district judge or the United States Commissioner, the witness may challenge the summons on any appropriate ground" (*id.* at 449).

Ten months later, in *United States* v. *Powell*, 379 U.S. 48, the Court definitively established the standards that the Internal Revenue Service must meet in order to obtain judicial enforcement of its orders. The case involved a summons with respect to tax years for which assessments would be barred except for fraud and the summoned parties urged that the Commissioner was required to show probable cause to suspect fraud. The Court, however, concluded that Congress had not imposed the burden of a probable cause showing upon the Commissioner. It held that the Commissioner need only show "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed * * * " (379 U.S. at 57–58). The Court further stated that "[i]t is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation" (*id.* at 58; *footnote omitted*).

In *Donaldson* v. *United States,* 400 U.S. 517, the Court rejected a taxpayer's attempt to intervene in a summons enforcement proceeding to obtain third party records on the ground that he had no proprietary interest in the records (which contained details of payments to him) and no other protectable interest or privilege to bar their production. Cf. *United States* v. *Miller,* 425 U.S. 435. The Court also considered the propriety of the use of the summons to determine whether to recommend criminal prosecution. It further held that "under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution" (400 U.S. at 536). The Court stated that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct" (*id.* at 535). However, "where a criminal prosecution has been instituted and is pending at the time of the issuance of the summons," the Court indicated that the purpose of the summons would be improper and enforcement should be denied if "the sole objective of the investigation is to obtain evidence for use in a criminal prosecution" (*id.* at 533). Accord: *Couch* v. *United States, supra,* 409 U.S. at 326.

2. This case focuses on the Court's holding in *Donaldson* that for purposes of determining the enforceability of an internal revenue summons, the Service's recommendation of a case to the Department of Justice for criminal prosecution is the event that transforms a tax investigation into a preliminary

criminal proceeding. Despite the Court's unequivocal ruling in *Donaldson* that an internal revenue summons "may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution" (400 U.S. at 536), the court of appeals held that a special agent may not issue a summons for third-party records in aid of a criminal investigation even though there had been no recommendation for prosecution.

But, as we shall show, the language of Section 7602 and its legislative history confirm that Congress intended that an internal revenue summons may be issued and should be enforced without any appraisal of the relative weight of the civil and criminal aspects of the tax investigation. There is accordingly no pertinence in the court of appeals' conclusion that Special Agent Olivero "was at all times involved in a criminal investigation, at least in Olivero's mind" (Pet. App. B, p. 8a). The distinction *Donaldson* drew was not between civil and criminal tax investigations, but between a summons issued before the Internal Revenue Service has recommended criminal prosecution to the Department of Justice and a summons issued after such a recommendation. It is only in the latter situation that the summons is unenforceable. Otherwise, a summons issued in the good faith conduct of a tax investigation (rather than for ulterior purposes or purposes of harassment) should be enforced if it meets the standards specified by this Court in *Powell, supra.* Indeed, *Donaldson* itself involved basically the same situation as the present case, and is controlling

here. There, as here, a summons seeking the production of records of third persons was issued by a Special Agent of the Internal Revenue Service who was conducting an investigation to determine whether criminal prosecution should be recommended.

B. THE CIVIL AND CRIMINAL ELEMENTS OF TAX INVESTIGATIONS ARE NECESSARILY INTERTWINED

The fundamental error of the court of appeals was its assumption that the special agent's investigatory activities were "solely for criminal purposes" so that his issuance of a summons to obtain evidence of criminal tax violations was "a quintessential example of bad faith" (Pet. App. B, p. 19a).

As the Court recognized in *Donaldson* v. *United States, supra,* 400 U.S. at 534, the functions of the Internal Revenue Service cannot be so compartmentalized between civil and criminal purposes. The Internal Revenue Service is organized to discharge the broad responsibilities of the Secretary of the Treasury to administer and enforce the internal revenue laws (26 U.S.C. 7801(a)). Each district office of the Internal Revenue Service has an audit division and an intelligence division to carry out the district director's responsibility for determining and assessing tax liability and investigating criminal and civil violations of the tax laws. While the Audit Division's program emphasizes the civil aspects of enforcement, it includes "participation with special agents [of the Intelligence Division] in the conduct of fraud investigations." Internal Revenue Service Organization and Functions, § 1113.563, 39 Fed. Reg. 11572, 11581.

The Intelligence Division (§ 1118.6) "enforces the criminal statutes applicable to income * * * [and other] tax laws * * * by developing information concerning alleged criminal violations thereof * * *." 39 Fed. Reg. 11607. The Intelligence Division also has responsibility for determining whether the 50 percent fraud penalty should be asserted under Section 6653 (b) of the Code. See Section 601.107(a), Treasury Regulations on General Procedural Rules (26 C.F.R.).

The Assistant Regional Commissioner in charge of the Intelligence Division provides further coordination between the Intelligence and Audit Divisions by developing (§ 1114.8) "regional programs, standards and other measures necessary to implement most effectively the intelligence program of the Service *which includes the investigation of alleged tax frauds, certain other civil and alleged criminal violations of tax laws * * *, and such other special investigations as the Commissioner may direct*" (§ 1114.8, 39 Fed. Reg. 11601; emphasis supplied). In addition, the Assistant Regional Commissioner supervises the review of special agents' reports of investigation submitted by the district offices in his region and approves or disapproves recommendations for prosecution. Further review of prosecution recommendations and referrals to the Department of Justice are made by the office of regional counsel for each region (§ 1114.82, 39 Fed. Reg. 11601).

Thus, as the Court observed in *Donaldson,* the combined efforts of the audit and intelligence divisions "are directed to both civil and criminal infractions;

and * * * any decision to recommend prosecution comes only after the investigation is complete or is sufficiently far along to support appropriate conclusions" (400 U.S. at 535).

The ultimate decision to refer the case to the Department of Justice is not made until the results of the investigation have been reviewed by the assistant regional commissioner for intelligence and a regional counsel. Moreover, the special agent may well conduct his investigation in concert with the district audit division, which is charged with the responsibility of uncovering liability for taxes and statutory additions. Finally, the authority of the assistant regional commissioner for intelligence to administer regional intelligence programs addressed to both civil and criminal violations gives assurance that the investigations of the district office intelligence divisions will be utilized as part of a coordinated effort to discover both criminal and civil infractions.

Given the close connection between the civil and criminal enforcement conducted by the Internal Revenue Service, it was unrealistic for the court of appeals to characterize the special agent's investigation in this case as "solely for criminal purposes" (Pet. App. B, p. 19a). Even apart from the fact that the agent here testified that the purpose of his inquiry was "[t]o determine the tax liabilities for the years under investigation" (A. 26) and that he needed the summoned materials to determine the accuracy of reported items of rental income, "[t]here is no statutory suggestion for any meaningful line of distinction, for

civil as compared with criminal purposes, at the point of a special agent's appearance." *Donaldson* v. *United States, supra,* 400 U.S. at 535. See also *Couch* v. *United States, supra,* 409 U.S. at 326. If there is evidence warranting a criminal prosecution, the same evidence is also likely to result in a deficiency assessment and a civil fraud penalty.

To be sure, the focus of a special agent's work is on possible criminal violations, so that he is only assigned to a case "as a result of some allegation or indication of criminal conduct" (*Donaldson* v. *United States, supra,* 400 U.S. at 537, n. 1 (Douglas, J., concurring)). But until the Internal Revenue Service refers a case to the Department of Justice with a recommendation for prosecution, "the civil aspects [of the investigation] are inextricably associated with the criminal" (*United States* v. *Billingsley,* 469 F. 2d 1208, 1210 (C.A. 10)).[1] Thus, the presence of a special agent does not necessarily mean that prosecution will ensue.

Indeed, statistics compiled by the Commissioner for the 1976 fiscal year demonstrate the significance of the special agent's role in civil as well as criminal enforcement. In that year, the Intelligence Division

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[1] The close connection between the civil and criminal aspects of a tax investigation and the statutory division of functions between the Internal Revenue Service and the Department of Justice is reflected in Section 7122(a) of the Code, which provides: "The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense."

commenced 8,797 full-scale tax fraud investigations. Only 2,037, or approximately one-quarter, of these investigations resulted in recommendations for prosecution. The 6,760 cases not recommended to the Department of Justice involved approximately $11 million in deficiencies and penalties. See 1976 Annual Report of the Commissioner of Internal Revenue, pp. 33, 61, 152.[2] Thus, even in those cases where no prosecution recommendations were made, substantial liabilities for tax deficiencies and penalties were uncovered.

C. THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 7602 CONFIRM THAT CONGRESS HAS AUTHORIZED THE USE OF AN INTERNAL REVENUE SUMMONS IN INVESTIGATING WHAT MAY PROVE TO BE CRIMINAL CONDUCT

1. Section 7602—the basic statutory authorization for the summons power—is cast in the broadest possible terms. It sanctions the summoning of "*any* * * * person" for the taking of testimony and examination of books which may be relevant for "ascertaining the correctness of *any* return, * * * determining the liability of *any* person for any internal revenue tax * * *, or collecting *any* such liability * * *." The statute does not speak in terms of civil or criminal investigations. To the contrary, the statute broadly encompasses every type of tax investigation, whether its direction is civil or criminal. "There is nothing in the language of § 7602 to limit the issuance of summonses to civil investigations." *Donaldson* v. *United States, supra,* 400 U.S. at 537 (Douglas, J., concurring).

[2] The 1969 statistics considered by the Court in *Donaldson* are comparable (see 400 U.S. at 535 n. 17).

Under Section 6659(a)(2) of the Code, the term "tax" includes any additions or penalties assessed in addition to a tax deficiency. When any underpayment of tax is "due to fraud," the taxpayer is not only subject to criminal sanctions under Sections 7201 or 7206 of the Code, but is also liable for a 50 percent penalty under Section 6653(b). Hence, the determination of the "liability of any person for any internal revenue tax" necessarily includes, where appropriate, an investigation into the possible existence of fraud or criminal conduct to determine whether a penalty is included in the total amount of tax liability. See *Donaldson* v. *United States, supra,* 400 U.S. at 535. The assignment of investigations to special agents of the intelligence divisions where there is reason to suspect fraud merely insures that the possible criminal aspects of the case will be fully explored; the first, and often the final, step of such assignment is to determine the correct tax liability of the person under investigation, including liability for any penalty.

2. a. As the Court observed in *Donaldson* v. *United States, supra,* 400 U.S. at 535, the legislative history of Section 7602 is in accord with our submission that the statute authorizes the use of a summons in investigating what may prove to be criminal conduct. That history shows that the summons power was derived from Sections 3614, 3615(a)–(c), and 3654 of the Internal Revenue Code of 1939 (see Table II to 1954 Code, 68A Stat. 969) and that these three pro-

visions had independent roots in revenue acts dating back to 1919, 1864, and 1868, respectively. An understanding of those three sections of the 1939 Code is essential because, in adopting Section 7602, Congress intended "no material change from existing law." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A436 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 617 (1954). See also H.R. Rep. No. 1337, *supra*, at 99; S. Rep. No. 1622, *supra*, at 133; 100 Cong. Rec. 3425 (1954).[3]

The first part of the "existing law" preserved in the 1954 Code appeared in part in Section 3614(a) of the 1939 Code, which provided as follows:

> *To determine Liability of the Taxpayer.* The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in

[3] Because the 1939 Code merely codified existing law without effecting substantive changes (see, *e.g.*, S. Rep. No. 20, 76th Cong., 1st Sess. 1 (1939)), earlier revenue acts must be examined in order to ascertain the meaning of specific provisions of that codification.

> such return, with power to administer oaths to such person or persons.

The Commissioner was first given the power to examine records and compel attendance of witnesses and take testimony in 1919 through the enactment of a virtually identical provision. Act of February 24, 1919, Section 1305, 40 Stat. 1057, 1142.[4]

The second part of the "existing law" carried forward in Section 7602 was contained in Section 3615 (a)–(e) of the 1939 Code, which granted a summons power to collectors,[5] by providing, in pertinent part, as follows:

> (a) *General Authority.*—It shall be lawful for the collector, subject to the provisions of

[4] Neither the committee reports nor the congressional debates contain any reference to the 1919 provision. The 1919 provision was reenacted several times before becoming part of the 1939 Code. Act of November 23, 1921, Section 1308, 42 Stat. 227, 310; Act of June 2, 1924, Section 1004, 43 Stat. 253, 340; Act of February 26, 1926, Section 1104, 44 Stat. (Part 2) 9, 113; Act of May 29, 1928, Section 618, 45 Stat. 791, 878.

[5] The summons authority was originally given to assessors and supervisors. Act of June 30, 1864, Section 14, 13 Stat. 223, 226; Act of July 20, 1868, Section 49, 15 Stat. 125, 144. These offices were abolished and the summons authority transferred to collectors. Act of December 24, 1872, Section 1, 17 Stat. 401; Act of August 15, 1876, 19 Stat. 143, 152.

The collectors continued to have the summons authority until the Treasury was reorganized under the Reorganization Act of 1949, 63 Stat. 203. The functions of all Treasury officials were transferred to the Secretary, who was authorized to redelegate all existing authority and the office of collector was abolished. See Reorganization Plan No. 26 of 1950 (15 Fed. Reg. 4935); Reorganization Plan No. 1 of 1952 (17 Fed. Reg. 2243). The summons in the present case was issued by the special agent pursuant to Delegation Order No. 4 (Rev.) (22 Fed. Reg. 3894).

this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. * * *

(b) *Acts Creating Liability.*—Such summons may be issued—

(1) *Refusal or neglect to comply with notice requiring return.*—If any person, on being notified or required as provided in section 3611, shall refuse or neglect to render such list or return within the time required, or

(2) *Failure to render return on time.*—Whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or

(3) *Erroneous, false or fraudulent return.*—Whenever any person who is required to deliver a monthly or other return of objects subject to tax delivers any return which, in the opinion of the collector, is erroneous, false, or fraudulent, or contains any undervaluation or understatement, or

(4) *Refusal to permit examination of books.*—Whenever any person who is required to deliver a monthly or other return of objects subject to tax refuses to allow any regularly authorized Government officer to examine his books.

(c) *Persons Liable.*—Such summons may be issued to—

(1) *Persons mentioned in subsection* (b).—Any person mentioned in subsection (b), or

(2) *Persons having books.*—Any other person having possession, custody, or care of books of account containing entries relating to the business of any person mentioned in subsection (b), or

(3) *Other persons.*—Any other person the collector may deem proper.

This section closely follows a provision first adopted in 1864, Act of June 30, 1864, Section 14, 13 Stat. 223, 226,[6] and reenacted several times prior to its codification in 1939.[7] See also Section 3616 of the 1939 Code, which imposed criminal sanctions upon any person failing to appear pursuant to a summons issued under Section 3615. See *Donaldson* v. *United States, supra,* 400 U.S. at 535.

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[6] There were no committee reports on the 1864 Act. However, the floor debates in the House show a general understanding that the summons authority would be used to investigate fraudulent conduct to defeat or evade the tax, a crime punishable by fine and imprisonment under Section 15 of the Act of June 30, 1864, 13 Stat. 223, 227. See 65 Cong. Globe, 38th Cong., 1st Sess. pp. 2660–2661 (1864); 66 Cong. Globe, 38th Cong., 1st Sess., pp, 2996–2997 (1864). Indeed, the use of the words "false or fraudulent" in Subsection (b)(3) and Section 14 of the Act of 1864 suggests that the collector was authorized to use the summons to investigate criminal conduct.

[7] Act of July 13, 1866, Section 9, 14 Stat. 98, 101; Act of December 24, 1872, Section 1, 17 Stat. 401. In 1873, the provision was codified as part of Section 3173 of the Revised Statutes of 1873–1874, which Section was amended by the Act of March 1, 1879, Section 3, 20 Stat. 327, 330–331; Act of August 27, 1894, Section 34, 28 Stat. 509, 557–559; Act of October 3, 1913, Section II(I), 38 Stat. 114, 177–179; Act of September 8, 1916, Section 16, 39 Stat. 756, 773–774; Act of February 24, 1919, Section 1317, 40 Stat. 1057, 1146–1147; Act of November 23, 1921, Section 1311, 42 Stat. 227, 311–312; Act of June 2, 1924, Section 1018, 43 Stat. 253, 344–346; Act of February 26, 1926, Section 1115, 44 Stat. (Part 2) 9, 117–119.

Finally, the third part of the "existing law" carried forward in Section 7602 of the 1954 Code is derived from Section 3654(a) of the 1939 Code,[8] which provided as follows:

> SEC. 3654. GENERAL POWERS AND DUTIES RELATING TO COLLECTION.
>
> (a) *Collectors.*—Every collector within his collection district shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615.

This Section was derived from an essentially identical provision first enacted in 1868, Act of July 20, 1868,

[8] Table II of the 1954 Code, 68A Stat. 969, states that Sections 3614 and 3615(a)–(c) of the 1939 Code were essentially carried forward in Section 7602 of the 1954 Code. See also *Donaldson* v. *United States*, *supra*, 400 U.S. at 535. Although Table II does not contain a reference to Section 3654 of the 1939 Code, the inclusion of the summons power in that provision coupled with the statements in the 1954 committee reports that Congress intended no material change in existing law requires an examination of Section 3654 as an aid to understanding the scope of the current summons power.

Section 49, 15 Stat. 125, 144–145, and codified as part of Section 3163 of the Revised Statutes of 1873–1874.[9]

Significantly, in the 1878 congressional debates concerning whether to extend the summons power held by the collectors to revenue agents, the power of the collectors to summon third-party records as a means of discovering evidence to aid in the detection and punishment of fraud appears to have been well understood and approved by Congress. See 7 Cong. Rec. 3920–3924 (1878). Indeed, the debate included (*id.* at 3922) a description of an incident in which an internal revenue summons was issued, under a predecessor of Section 3654, to a railroad to examine its books of account in order to determine whether certain distillers had committed tax fraud by shipping spirits that were untaxed.[10]

[9] This statute was amended by the Act of August 15, 1876, 19 Stat. 143, 152, pursuant to which the supervisors' functions were eliminated and their investigative powers transferred to the collectors. See note 5, *supra*. Section 3163 of the Revised Statutes was amended by the Act of March 1, 1879, Section 2, 20 Stat. 327, 328, which also imposed upon revenue agents, in addition to collectors, the duty to see that all laws and regulations relating to the collection of internal revenue taxes were faithfully executed. Because at that time Congress did not want to extend to revenue agents the summons power given to collectors, the reference to the summons authority was deleted from Section 3163 of the Revised Statutes. See 7 Cong. Rec. 3920–3924 (1878). However, the collectors continue to maintain the authority to issue summonses under the Act of August 15, 1876, 19 Stat. 143, 152, which was carried forward into Section 3654(a) of the 1939 Code. See Table B, 53 Stat. (Part 1) XLII.

[10] In interpreting Section 49 of the Act of July 20, 1868, 15 Stat. 144–145, the courts likewise recognized that the Treasury had the

b. By combining Sections 3614, 3615(a)–(c), and 3654 into Section 7602 in 1954 without intending to change existing law, Congress continued to sanction the use of an internal revenue summons to obtain evidence of what might prove to be criminal conduct. Like Section 7602, all of these prior provisions cast the summons power in the broadest possible manner, using terms such as "any person," "any return," and "any objects or income liable to tax." Moreover, the expansive scope of Section 3654 of the 1939 Code, granting to the collectors the power to issue summonses for any purpose relating to their duty to oversee the faithful execution of internal revenue laws and the "prevention, detection, and punishment of any frauds," strongly supports a reading of Section 7602 as empowering the Service to use the summons for investigation into possible criminal conduct.

Thus, the history as well as the text, of both the current provision and its authoritative predecessors, confirms the correctness of the Court's observation in *Donaldson* that "[t]here is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance" (400 U.S. at 535). Since we submit that this case is controlled by *Donaldson,* and that the court of appeals' appraisal of the relative weight of the civil and criminal aspects of the inves-

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duty to detect criminal activity and the authority to use its summons power to investigate what might prove to be criminal conduct. See *Stanwood* v. *Green*, 22 Fed. Cas. 1077 (S.D. Miss.) (No. 13,301); *In re Meador*, 16 Fed. Cas. 1294 (N.D. Ga.) (No. 9,375).

tigation is contrary to that decision, we turn now to a detailed discussion of *Donaldson.*

D. THIS COURT'S DECISION IN *DONALDSON* V. *UNITED STATES*, 400 U.S. 517, CONTROLS THIS CASE

1. As we have noted, this Court in *Donaldson* v. *United States, supra,* 400 U.S. at 536, held "that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith, and prior to a recommendation for criminal prosecution." The Court stated that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct" (*id.* at 535). As the Court there recognized, there is no realistic distinction between a civil and a criminal tax investigation for purposes of the enforceability of an internal revenue summons. The critical distinction established by *Donaldson* is between a summons issued before the Internal Revenue Service has recommended criminal prosecution to the Department of Justice and a summons issued after such a recommendation.

Here, at the time Special Agent Olivero issued the summonses to respondents, the Internal Revenue Service had not recommended to the Department of Justice whether the taxpayer under investigation should be prosecuted. Moreover, the information sought by Olivero with respect to the correct amount of the taxpayer's rental income was relevant in determining both his civil tax liability and whether he was guilty of any criminal tax violations. Since "[i]t

is now undisputed that a special agent is authorized, pursuant to 26 U.S.C. § 7602, to issue an Internal Revenue summons in aid of a tax investigation with civil and possible criminal consequences" (*Couch* v. *United States, supra*, 409 U.S. at 326; footnote omitted), there is no bar to the enforcement of the summonses in this case.

Although the court of appeals acknowledged that the final paragraph of this Court's *Donaldson* opinion established the recommendation for prosecution by the Internal Revenue Service as the line of demarcation between a civil and a criminal case, it nevertheless concluded that a summons issued prior to such a recommendation would not meet the "good faith" requirement of *Donaldson* if it were issued "solely for criminal purposes" (Pet. App. B, p. 19a). The court relied upon the earlier discussion in *Donaldson* of the dictum in *Reisman* v. *Caplin, supra,* 375 U.S. at 449, that—

> the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought * * * for use in a criminal prosecution, *Boren* v. *Tucker,* 239 F. 2d 767, 772–773, * * *.

In explaining this dictum, the Court in *Donaldson* stated that "[t]he *Reisman* dictum * * * comes into proper focus as applicable to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes" (400 U.S. at 533). Emphasizing the final phrase of this sentence, the court of

appeals held that a summons issued "solely for criminal purposes," even prior to the recommendation of a criminal prosecution, would not meet the "good faith" standard of *Donaldson*. We submit, however, that it is more consistent with the remainder of the *Donaldson* opinion to read that phrase as referring only to the period between the Service's recommendation of criminal prosecution to the Department of Justice and the actual bringing of criminal charges (to which the first part of the sentence refers).

As we have shown, *Donaldson* holds that no meaningful line can be drawn between the "civil" and "criminal" purposes of a special agent's investigation prior to the Internal Revenue Service's recommendation for prosecution (400 U.S. at 535). Hence, we submit that if a summons is issued, prior to such recommendation,[11] for one of the purposes enumerated in Section 7602 relating to the functions of the Internal Revenue Service and not for ulterior purposes or harassment, it will meet the "good faith" standard of *Donaldson* despite the fact that the focus of the agent's inquiry is to uncover evidence of criminal conduct. Indeed, in outlining the basis for the enforce-

[11] There is no need to consider in the present case whether it would be proper in some circumstances for the Internal Revenue Service to continue a tax investigation, and issue summonses in furtherance thereof, after it has recommended prosecution. We do not read *Donaldson* or *Reisman* as intended to deprive the Treasury of the use, for all purposes, of its basic tax enforcement tool once it has transmitted its recommendation to the Department of Justice. The teaching of those cases is that Congress has not authorized the use of the summons on behalf of the Department of Justice in the carrying out of its prosecutorial functions.

ment of an internal revenue summons, the Court in *United States* v. *Powell,* 379 U.S. 48, significantly did not exclude criminal investigations from the scope of the summons power. There, the agent alleged in the petition for enforcement that he "had reason to suspect that the taxpayer had fraudulently falsified its 1958 and 1959 returns by overstating expenses" (*id.* at 50). In upholding the use of a summons in such a case, the Court held that the Commissioner's burden is limited to a showing "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed * * *" (*id.* at 57–58). Since the summonses at issue here undisputably met the standards established in *Powell,* the courts below erred in refusing to enforce them.

Moreover, the Court's discussion in *Donaldson* (400 U.S. at 533) of its *Reisman* dictum demonstrates that the phrase employed in *Donaldson*—"an investigation solely for criminal purposes" (*ibid.*)—refers only to the issuance of a summons after the Internal Revenue Service has recommended prosecution. After noting that a summons is improper if it is issued after a criminal prosecution has been instituted and "the sole objective of the investigation is to obtain evidence for use in * * * [that] prosecution," the Court stated that it was "precisely * * * [that] situation—where the sole object of the investigation is to gather data for criminal prosecution—that is the subject of the *Reis-*

man dictum" (400 U.S. at 533). As the Court further observed, "[t]his is evident from the fact that the dictum itself embraces the citation of *Boren* v. *Tucker,* 239 F. 2d 767, 772–773 (CA9 1956), an opinion in which, at the pages cited, the Ninth Circuit very carefully distinguished *United States* v. *O'Connor,* 118 F. Supp. 248 (Mass. 1953), a case where the taxpayer already was under indictment" (400 U.S. at 533).[12] Thus, the Court concluded that "[t]he *Reisman* dictum is to be read in the light of its citation of *Boren,* and of *Boren's* own citation of *O'Connor;* when so read, the dictum comes into proper focus as applicable to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes" (*ibid.*).

Since the Court had earlier cited with approval those cases that expressly sanctioned the use of a summons issued to investigate criminal conduct when no criminal prosecution had been instituted (400 U.S. at 532–533, nn. 13, 14), the phrase "an investigation solely for criminal purposes" necessarily refers, in the context of the entire opinion, to the situation where the Internal Revenue Service has already recommended prosecution.

2. In the present case, therefore, the court of appeals misinterpreted and misapplied the *Donaldson* standard, which establishes the Service's recommenda-

[12] In *O'Connor*, the taxpayer was indicted on February 13, 1953; however, the Internal Revenue Service's petition for enforcement of its summons was not returnable until October 19, 1953 (see 118 F. Supp. 248, 249, 250 (D. Mass.)).

tion for prosecution as the basic line of demarcation for the enforcement of an internal revenue summons. Since the Court's decision in that case turned upon its recognition of the dual criminal and civil investigatory responsibilities of the Internal Revenue Service, there was no occasion for the district court to reject the credibility of the special agent's testimony that there were civil aspects to his investigation. As we have pointed out (*supra,* pp. 16–18), the Internal Revenue Service is the agency charged with the administration and enforcement of the tax laws (see 26 U.S.C. 7801) and every investigation, whether it is conducted by special agents or revenue agents, has as one of its purposes the collection of revenue. Since the Internal Revenue Service had not recommended prosecution of any individual prior to the special agent's issuance of the summons, "the civil aspects [of the investigation] * * * were inextricably associated with the criminal." *United States* v. *Billingsley, supra,* 469 F. 2d at 1210. Under the objective standard of *Donaldson,* the summonses were therefore enforceable even though the special agent might uncover evidence of criminal conduct.

"Any other holding, of course, would thwart and defeat the appropriate investigatory powers that the Congress has placed in 'the Secretary and his delegate.' " *Donaldson* v. *United States, supra,* 400 U.S. at 533. There is accordingly no pertinence in the court of appeals' conclusion that special agent Olivero "was at all times involved in a criminal investigation, at least in Olivero's mind" (Pet. App. B, p. 8a). Under

Donaldson, the subjective intent of the agent issuing a summons prior to a recommendation for prosecution is irrelevant because his inquiry necessarily involves questions of civil tax liability. Thus, in a summons enforcement proceeding, the summons will meet the *Donaldson* "good faith" standard if it is issued prior to a recommendation for criminal investigation, for one of the purposes enumerated in Section 7602 relating to the functions of the Internal Revenue Service and not for ulterior purposes or harassment. See *United States* v. *Powell, supra,* 379 U.S. at 57–58. See also *Donaldson* v. *United States, supra,* 400 U.S. at 526–527; *United States* v. *Kordel, supra,* 397 U.S. at 11–13.

The departure of the decision below and of other courts of appeals from the line of demarcation established in *Donaldson* in favor of an inquiry into the agent's subjective motive threatens to impair the enforcement of the internal revenue laws. For if the courts engage in a search for the agent's "sole purpose" or "fixed purpose," the enforceability of summonses will be subject to litigation-producing uncertainties, and summons enforcement proceedings will become enmired in a host of factual details and subjective inquiries that are irrelevant to the purposes of the summons power set forth in Section 7602.[13] The

[13] See, *e.g.*, *United States* v. *Weingarden*, 473 F. 2d 454 (C.A. 6) (summons not enforceable even though issued prior to recommendation for prosecution; standard is whether sole purpose of summons is for criminal prosecution); *United States* v. *Wall Corp.*, 475 F. 2d 893 (C.A.D.C.) (summons not enforceable if agent had already formed "fixed purpose" to recommend prosecution). Accord: *United States* v. *McCarthy*, 514 F. 2d 368, 374–375

potential for delay of criminal investigations beyond the expiration of the statute of limitations would require the Internal Revenue Service, "in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution," and thereby "stultify enforcement of federal law" (*Donaldson* v. *United States, supra,* 400 U.S. at 536).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1978.

(C.A. 8); *United States* v. *Lafko*, 520 F. 2d 622, 624–625 (C.A. 3); *United States* v. *Zack*, 521 F. 2d 1366, 1368 (C.A. 9).

Contra: *United States* v. *Troupe*, 438 F. 2d 117 (C.A. 8) (summons can be successfully challenged only when criminal prosecution is pending at time of issuance of summons or when prosecution has been recommended); *United States* v. *Billingsley*, 469 F. 2d 1208, 1210 (C.A. 10) (recommendation from the Internal Revenue Service to the Department of Justice is the operative recommendation under *Donaldson*). Accord: *United States* v. *Hodge and Zweig*, 548 F. 2d 1347, 1351 (C.A. 9).

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SECTION 7122. COMPROMISES

(a) *Authorization.*—The Secretary or his delegate may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

* * * * *

SECTION 7402. JURISDICTION OF DISTRICT COURTS

* * * * *

(b) *To enforce summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

SECTION 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS

(a) *General rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue

tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

(b) *Penalties.*—

For penalties applicable to forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties, see section 7212.

SECTION 7602. EXAMINATION OF BOOKS AND WITNESSES

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SECTION 7604. ENFORCEMENT OF SUMMONS

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * * *

SECTION 7608. AUTHORITY OF INTERNAL REVENUE ENFORCEMENT OFFICERS

* * * * *

(b) *Enforcement of laws relating to internal revenue other than subtitle E.*

(1) Any criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal Revenue Service whom the Secretary or his delegate charges with the duty of enforcing any of the criminal provisions of the internal revenue laws or any other criminal provisions of law relating to internal revenue for the enforcement of which the Secretary or his delegate is responsible is, in the performance of his duties, authorized to perform the functions described in paragraph (2).

(2) The functions authorized under this subsection to be performed by an officer referred to in paragraph (1) are—

(A) to execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under authority of the United States;

(B) to make arrests without warrant for any offense against the United States relating to the internal revenue laws committed in his presence, or for any felony cognizable under such laws if he has reasonable grounds to believe that the person to be arrested has committed or is committing any such felony; and

(C) to make seizures of property subject to forfeiture under the internal revenue laws.

SECTION 7801. AUTHORITY OF DEPARTMENT OF THE TREASURY

(a) *Powers and duties of Secretary.*—Except as otherwise expressly provided by law, the administration and enforcement of this title shall be performed by or under the supervision of the Secretary of the Treasury.

* * * * *

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FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-365

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

vs.

LASALLE NATIONAL BANK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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INDEX.

PAGE

Question Presented 1

Statement 1

Argument

An Internal Revenue Service Summons May Not Be Issued Solely in Aid of a Criminal Investigation 4

A. The Internal Revenue Service Is Not Authorized to Issue a Summons Solely in Aid of a Criminal Investigation 4

B. The Findings of the District Court Were Not Clearly Erroneous and Therefore Were Correctly Sustained 11

C. The Language and Legislative History of Section 7602 Confirm That Congress Has Never Authorized the Use of an Internal Revenue Service Summons Solely in Aid of a Criminal Investigation 13

D. This Court's Decisions in Donaldson v. United States, 400 U. S. 517, and United States v. Powell, 379 U. S. 48 Support the Conclusions of Law Below 15

E. The Summonses Herein Request Information Already Within the Possession of the Internal Revenue Service and Are Unenforceable for That Reason 16

Conclusion 19

CITATIONS.

Cases.

Abel v. United States, 362 U. S. 217 16
Couch v. United States, 409 U. S. 322 ..... 5, 6
Donaldson v. United States, 400 U. S. 519 ...3, 8, 9, 10, 15, 16
Fisher v. United States, 425 U. S. 391 ..... 5, 6
Reisman v. Caplin, 375 U. S. 440 .....7, 8, 9
United States v. Bisceglia, 420 U. S. 141 .....5, 6, 7, 15
United States v. Kordel, 397 U. S. 1 6
United States v. Morton Salt Co., 338 U. S. 632 14
United States v. Powell, 379 U. S. 48 .....7, 9, 14, 15, 16, 17

Statutes.

Act of February 24, 1919, 40 Stat. 1057, 1124:
Section 1305 13
Ill. Rev. Stat. Ch. 29, § 8.31 (1971) 2, 18
Internal Revenue Code of 1939 (26 U. S. C.):
Section 3611 14
Section 3614 14
Section 3614(a) 13
Section 3615(a)-(c) 13, 14
Section 3654(a) 14

Internal Revenue Code of 1954 (26 U. S. C.):
Section 7602 .....4, 13, 14, 15

Miscellaneous.

Internal Revenue Manual Handbook 28, Handbook for Special Agents in the Intelligence Division 11

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

QUESTION PRESENTED.

Whether the Internal Revenue Service properly may issue a summons solely in aid of a criminal investigation.

STATEMENT.

On August 15, 1975, two summonses from the Internal Revenue Service were served upon the Respondents. The summonses were directed to the LaSalle National Bank as trustee under two Illinois land trusts,[1] and required the Respondents to appear

1. An Illinois land trust is a contract by which a trustee is vested with both legal and equitable title to real property and the interest of the beneficiary is considered personal property. Under this trust

(Footnote continued on next page.)

and give testimony as well as produce records with respect to these land trusts. (A. 9-16)

The Respondents appeared in response to the summonses, but, on advice of counsel, did not produce the land trust records or give testimony.

On November 19, 1975, the Petitioners herein filed a petition seeking judicial enforcement of the summonses. On that date the District Court for the Northern District of Illinois entered an *Ex Parte* Order requiring the Respondents to appear on December 5, 1975, and to show cause why they should not be compelled to obey the two Internal Revenue Service summonses.

Pursuant to the Order, the Respondents appeared on December 5, 1975, at a hearing held by the district court to determine the enforceability of the two Internal Revenue Service summonses. Special Agent John F. Olivero was the sole witness on behalf of Petitioners and his investigative file was examined by the district court *in camera*.

On March 9, 1976, the district court entered its Order and Memorandum Opinion denying judicial enforcement of the two Internal Revenue Service summonses, stating in its opinion that "[i]t is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso." (App. A. p. 3a)

On May 7, 1976, the Petitioners herein filed their Notice of Appeal. The cause was briefed and set for argument before the United States Court of Appeals for the Seventh Circuit, which issued its ion on April 11, 1977.

(Footnote continued from preceding page.)
the beneficiary or any person designated in writing by the beneficiary has the exclusive power to direct or control the trustee in dealing with the title and the exclusive control of the management, operation, renting and selling of the trust property together with the exclusive right to the earnings, avails and proceeds of said property. Ill. Rev. Stat. Ch. 29, § 8.31 (1971).

The court of appeals defined its undertaking in terms of two questions. The first issue concerned the court's scope of review, while the second issue was characterized by the court as "whether the district court applied the proper legal test in making its finding of fact." (Res. App. B, p. 9a)

It is apparent from a reading of the opinion below that the court of appeals dealt unequivocally with the second question, resolving it in favor of the Respondents:

> "We agree with the respondents that the petitioners arguments ignore the good faith requirement of *Donaldson*. We further agree that the real issue before the court is whether the Internal Revenue Service may issue a summons solely in aid of a criminal investigation and still meet the standard of good faith as enunciated in *Donaldson*." (Res. App. B, p. 14a.)

Relying on *Donaldson* v. *United States*, 400 U. S. 519, and the standard for enforcing an Internal Revenue Service summons provided therein, the court of appeals stated:

> "We think that the Government oversimplifies the evidentiary posture of the case. Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him." (Res. App. B, p. 15a.)

Finally, the court of appeals found no misapplication of the standard set forth in *Donaldson:*

> "We note that the district court expressly observed that the *bona fides* of the investigation was in issue. The Government attempts to use the district court's statement as an indication that it applied the wrong legal test. Our reading of the reported cases persuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith. In view of our reading of the crucial language in *Donaldson*, see 400 U. S. at 536, we read the statement as a faithful reflection of that decision's alternative holding." (Res. App. B, p. 15a.)

On September 8, 1977, the Petitioners herein filed their Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The Petition for Writ of Certiorari was granted on December 12, 1977.

ARGUMENT.

An Internal Revenue Service Summons May Not Be Issued Solely in Aid of a Criminal Investigation.

A. The Internal Revenue Service Is Not Authorized to Issue a Summons Solely in Aid of a Criminal Prosecution.

1. The essential question before the Court is whether the Internal Revenue Service is authorized, pursuant to Section 7602 of the Internal Revenue Code, to issue a summons solely in aid of a criminal investigation. Section 7602 states, in part:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any Internal Revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any Internal Revenue tax, or collecting any such liability, the Secretary of his delegate is authorized . . .

The findings of the district court below and the decision of the Court of Appeals on review of those findings unequivocably establish that the summonses in question were issued solely in aid of a criminal investigation. (Res. App. A, pp. 2a-3a; Res. App. B, p. 15a) The findings and opinion below clearly state the fact that the purpose of the summonses issued herein were not to ascertain the correctness of any return, make a return where none had been made, to determine transferee liability, or, for that matter, to collect any such liability. Rather, the summonses issued herein were issued solely in aid of a criminal investigation and not for any of the purposes enumerated in Section 7602 of the Internal Revenue Code.

Petitioners seek to avoid this finding by asserting that the authority to issue summonses follows from the general duties of the Treasury to administer and enforce the Internal Revenue laws. They submit to the Court, in direct contradiction to the findings and opinion below, that the summonses at issue are in furtherance of those duties.

Additionally, the Petitioners assert that the Court has rejected past attempts to limit the power of the Internal Revenue Service to issue summonses. In support of this proposition, they cite the Court to its decisions in *Couch* v. *U. S.*, 409 U. S. 322; *Fisher* v. *U. S.*, 425 U. S. 391; and *U. S.* v. *Bisceglia*, 420 U. S. 141. A reading of these cases demonstrates that each is inapposite to the issue before the Court.

Petitioners first cite the Court to *Couch*. The basic issue before the Court in *Couch* was the applicability of the Fifth Amendment privilege against compulsory self-incrimination with respect to tax records that had remained in the continuous possession of the taxpayer's accountant.

In *Fisher*, the issue before the Court was almost identical to that in *Couch*. In *Fisher*, as in *Couch*, the taxpayer had delivered and transferred documents to his attorney and the Fifth Amendment privilege against compulsory self-incrimination was raised as a defense to the production of these transferred records. The Court in *Fisher* found, as it did in *Couch*, that the enforcement of the summons would not compel the taxpayer to be a witness against himself and, hence, found the Fifth Amendment privilege to be inapplicable.

The Petitioners herein cite with emphasis *U. S.* v. *Bisceglia*, 420 U. S. 141. The Court in *Bisceglia* did no more than approve the use of a 'John Doe' summons against Fourth and Fifth Amendment challenges. Additionally, *Bisceglia*, like *Couch* and *Fisher*, involved an investigation into civil and possible criminal liability. The facts herein, as determined by the courts below, are that no civil liability was being investigated by Special Agent

Olivero. The Court in *Bisceglia* noted the inherent limitations of the Internal Revenue Service with respect to its summons power:

> We recognize that the authority vested in tax collectors may be abused, as all power is subject to abuse . . .
>
> Substantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts. (Citations omitted) 420 U.S. at 146.

The Petitioners further cite the Court to *U. S.* v. *Kordel,* 397 U. S. 1. In *Kordel,* the subject matter of a civil forfeiture proceeding under the Federal Food, Drug, and Cosmetic Act became the basis of a later criminal prosecution. The criminal defendants sought to have their convictions set aside on the basis that their answers to interrogatories in the civil forfeiture proceeding violated their Fifth Amendment privilege against compulsory self-incrimination. In upholding the convictions the Court succinctly stated the issue:

> Overturning these convictions would be tantamount to the adoption of a rule that the Government's use of interrogatories directed against a corporate defendant in the ordinary course of a civil proceeding would always immunize the corporation's officers from subsequent criminal prosecution. 397 U.S. at 12-13.

The Petitioners' reliance on *Kordel* is misplaced. The Court in *Kordel* stated: "We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution . . ." 397 U. S. at 11-12. In the instant case, the Government has brought a civil action solely to obtain evidence for a criminal prosecution. Neither *Kordel* nor any other case cited by the Petitioners support or approve this use of a summons. *Couch* and *Fisher* relate only to the Fifth Amendment privilege with respect to documents in the hand of third parties, while *Bisceglia* approves the use of a 'John Doe' summons with respect to third party records. The Respondents herein did not assert a Fifth Amendment privilege

with respect to the records which are the subject matter of the summonses, and no such privilege was found by the district court. Further, the summonses herein specifically named the taxpayer, precluding any reference to *Bisceglia.*

The Court in both *Reisman* v. *Caplin,* 375 U. S. 440, and *United States* v. *Powell,* 379 U. S. 48, provided the foundation upon which the decision below rests. In *Reisman,* the Court carefully outlined the procedural prerequisites for the enforcement of a summons and then stated:

> Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, Boren v. Tucker, 9 Cr. 239 F2d. 767, 772-773, . . . *Id.* at 449.

Following *Reisman,* the Court in *Powell* held that the Internal Revenue Service could issue a summons without making a showing of probable cause to suspect fraud, unless the taxpayer raised a substantial question regarding the judicial enforcement of the summons. The standards articulated in *Powell* require the Commissioner to show that the investigation would be conducted pursuant to a legitimate purpose, that the inquiry was relevant to that purpose, and that the information sought was not within the Commissioner's possession already.

Nevertheless, the Court stated that, although the Commissioner need not meet a standard of probable cause to obtain enforcement, it was not the intent of the Court to "make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered." *Id.* at 55. The Court went on to state:

> At the hearing he 'may challenge the summons on any appropriate ground,' Reisman v. Caplin, 375 U. S. 440, at 449, 84 S. Ct. at 513. (Footnote omitted) Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the

> examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. (Footnote omitted) Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. *Id.* at 58.

In *Donaldson* v. *United States*, 400 U. S. 517, the Court affirmed the lower court decision denying intervention to a taxpayer on the basis that the taxpayer had no proprietary interest in the records sought through the summons enforcement proceeding. The petitioners therein additionally argued that the summons should not be enforced because it potentially could result in a recommendation that criminal prosecution be instituted against him. In response to this argument, the Court analyzed the dictum in *Reisman* and stated:

> It is precisely the latter situation—where the sole object of the investigation is to gather data for criminal prosecution—that is the subject of the Reisman dictum. This is evident from the fact that the dictum itself embraces the citation of Boren v. Tucker, 239 F.2d 767, 772-773 (CA9 1956), an opinion in which, at the pages cited, the ninth circuit very carefully distinguished United States v. O'Connor, 118 F. Supp. 248 (Mass. 1953), a case where the taxpayer already was under indictment. The Reisman dictum is to be read in the light of its citation of Boren, and of Boren's own citation of O'Connor; when so read, the dictum comes into proper focus as applicable to the situation of a pending criminal charge or, at most, of an *investigation solely for criminal purposes*. (Emphasis supplied) *Id.* at 533.

The analysis by the Court of the dictum in *Reisman* clearly establishes that if the sole object of the investigation is to gather evidence for a criminal prosecution, the issuance of such summons is improper.

It was not the entry of the special agent into the investigation, nor the fact that this investigation was conducted solely by a

special agent, that rendered these summonses unenforceable. Rather, it was the issuance of these summonses by the special agent solely in aid of a criminal investigation that rendered them unenforceable.

The Petitioners assert that, prior to the Service's recommendation of a case to the Department of Justice, an investigation cannot be considered a preliminary criminal proceeding. It is precisely this mechanistic approach that allows and encourages the abuse of the summons' power. For the Court to adopt such an approach with respect to judicial enforcement of summonses in effect would destroy the very protection that such judicial review affords. Congress did not provide judicial review of such summonses merely to confer a judicial imprimatur on the administrative fiat of the Internal Revenue Service. Rather, the purpose of such review was to prevent the very abuses articulated by the Court in the dicta found in *Reisman*, *Powell* and *Donaldson* and by the courts below in the case at bar.

The Petitioners would assert that the distinction *Donaldson* drew was between a summons issued before the Internal Revenue Service recommended criminal prosecution to the Department of Justice and a summons issued following such recommendation. Such a characterization is simplistic and ignores the very standard of good faith enunciated by the Court in *Donaldson*.

It is the issuance of a summons solely in aid of a criminal investigation that renders a summons improper. The fact that a recommendation has been made to the Department of Justice does not terminate an investigation. Likewise, such a recommendation does not put the Government to an election of remedies, *i.e.* criminal v. civil liability. The distinctions posited by the Petitioners are not dispositive of the issue before the Court. The impropriety in the issuance of a summons after such recommendation lies not in the recommendation itself, but in the fact that after such recommendation, a summons is considered issued solely in aid of a criminal investigation.

The fact that a special agent has not initiated the administrative steps necessary to such recommendation does not establish *a priori* that all summonses issued by the special agent are enforceable, or, for that matter, that they are not issued solely in aid of a criminal investigation. It is clear that this distinction, which is urged upon the Court by the Petitioners, ignores the "good faith" requirement of *Donaldson*.

Petitioners refer to the investigation of the special agent herein as a "tax" investigation. Nothing in the decisions of either the district court or appellate court in this matter supports such a characterization. Nowhere is the investigation defined as a tax investigation. Rather, the opinions and findings below characterize the investigation as a criminal investigation. The district court's finding was clear:

> It is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso. (Res. App. A, p. 3a.)

The court of appeals reviewed and affirmed this finding, stating:

> We are not persuaded that an improper legal test was applied and thus we cannot so simply evade the question. We hold that the clearly erroneous standard governs review of findings that an IRS summons has or has not issued in good faith. Assuming arguendo that the Supreme Court has not overruled or qualified Donaldson in its more recent adjudications, there is ample support in the record for the district court's finding of sole criminal purpose. The record establishes that Olivero testified to the existence of the civil purpose but that the district court, who observed the demeanor of the witnesses, discredited that testimony. We are not left with a firm and definite conviction that mistake has been made. (Res. App. B, p. 9a.)

B. The Findings of the District Court Were Not Clearly Erroneous and Therefore Were Correctly Sustained.

The Petitioners seek to avoid the adverse findings of fact which were sustained on appeal, namely, that the instant summonses were issued solely in aid of a criminal investigation. They attempt to do so by reciting the organizational manual of the Internal Revenue Service. The ultimate conclusion drawn by the Petitioners is that the authority of the Assistant Regional Commissioner with respect to both civil and criminal violations assures that these investigations will be utilized properly. This conclusion was not borne out in the instant case and is in complete disregard of the district court's findings. The fact that the Government may author manuals does not establish axiomatically that each agent and employee of the Government follows those manuals. During the cross-examination of Special Agent Olivero in the district court, the special agent admitted that he had not read in its entirety the *Internal Revenue Manual Handbook 28, Handbook for Special Agents in the Intelligence Division*, which is the very manual governing the conduct of such special agents in these investigations. (App. p. 42) Further, when questioned as to whether he followed the instructions and duties as outlined in the manual, the special agent admitted that he had not followed them and that he would ignore the manual in the event that the "home ground rules" were to the contrary. (App. pp. 42-44)

The Petitioners resorted to the sophistry of reciting the provisions of the organizational manual of the Internal Revenue Service in their brief on appeal to the Seventh Circuit. In response to such argument the court held:

> The Government insists that there was no evidence that Special Agent Olivero was not simultaneously pursuing a civil investigation. Reading the record evidence in this fashion, the Petitioners submit that it is clear that the special agent's investigation encompassed the purpose of determining the taxpayer's tax liability. Suggesting that the district court misfocused its inquiry, the Petitioners insist

that the only relevant inquiry is whether the investigation in aid of which the summons is issued is directed at least in part toward determining the liability of some person for an Internal Revenue tax. (Footnote omitted) The Government argues that once it is demonstrated that there is nothing unusual or sinister about the special agent focusing his attention on the criminal aspects of the case, the finding of sole criminal purpose must fall.

We think that the Government oversimplifies the evidentiary posture of the case. Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him.

We note that the district court expressly observed the bona fides of the investigation was in issue. The Government attempts to use the district court's statement as an indication that it applied the wrong legal test. Our reading of the reported cases pursuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith. In view of our reading of the crucial language in Donaldson, see 400 U. S. at 536, we read the statement as a faithful reflection of that decision's alternative holding. (Res. App. B, pp. 14a-15a.)

The statistics compiled by the Commissioner for 1976 should not be used as a basis for overturning the finding of fact below. The instant case concerns itself with two specific summonses. The fact that only one quarter of the full scale tax fraud investigations conducted during 1976 resulted in a recommendation for prosecution is irrelevant. That fact is of no aid in determining for what purpose any specific summons may issue.

Petitioners state that even in cases where no prosecution has been recommended substantial liabilities for tax deficiencies and penalties have been uncovered. It no doubt can be assumed that in the 2,037 cases recommended for prosecution substantial liabilities for tax deficiencies and penalties also were uncovered. Where the Government prosecutes for criminal tax violations, the claim for civil deficiencies and penalties are not waived and collection of such are sought as vigorously as in those cases where no recommendation for prosecution is made.

It is clear that the finding of the district court that the summonses were issued solely in aid of a criminal investigation was a finding of fact. It also is clear that the review of that finding is governed by the "clearly erroneous standard". As the court of appeals stated, "there is ample support in the record for the district court's finding of sole criminal purpose". (Res. App. B, p. 9a)

C. The Language and Legislative History of Section 7602 Confirm That Congress Never Has Authorized the Use of a An Internal Revenue Service Summons Solely in Aid of a Criminal Investigation.

The Petitioners exhaustively have traced the legislative history of Section 7602 and conclude that a summons may be used to investigate what may prove to be criminal conduct. Such analysis and the conclusion drawn therefrom avoids the issue, *i.e.*, that the instant summonses were issued solely in aid of a criminal investigation, not to investigate possible civil liabilities which ultimately might lead to criminal prosecution.

Section 7602 carefully delineates the purposes for which a summons may be issued: ascertaining the correctness of a return; making a return where none has been made, and determining transferee or fiduciary liability. The historical antecedents of the statute as cited by the Petitioners track almost precisely the wording now contained in Section 7602.

Section 3614(a) of the 1939 Code provided that the Commissioner could issue a summons for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none had been made. The Petitioners correctly trace the basis of Section 3614(a) to the Act of February 24, 1919, Section 1305, 40 Stat. 1057, 1124, which contained an identical provision.

The Petitioners also cite the Court to Section 3615(a)-(c) of the 1939 Code. That section provided a summons power to the collector under four specifically enumerated circumstances. A

summons could be issued to an individual notified under Section 3611 of the 1939 Code and who failed to comply with such notice. Further, it could be issued to any individual who failed to file a timely return, to any person who the collector determined may have filed an erroneous, false or fraudulent return or to any person who is required to file a return and who has refused to allow examination of his books. None of the purposes applies to the present case.

The investigating authority of the Internal Revenue Service, like that of other agencies, is not without limitations. The summons must be within the authority of the agency. *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652, 653. While the broad investigative powers under Section 7602 have been endorsed by the courts, the summonses issued pursuant thereto must be in furtherance of and relevant to a legitimate purpose. *United States* v. *Powell*, 378 U. S. 48.

Neither the present statute nor the previous statutes authorize or permit the issuance of a summons solely in aid of a criminal investigation. The finding of the district court to such effect precludes any argument by the Petitioners that said summons were or could have been issued in aid of or pursuant to any of the provisions contained in Section 7602 or, for that matter, Sections 3614 and 3615 of the 1939 Code.

The legislative history of Section 7602 does not authorize or give the authority to the secretary or his delegate to issue a summons solely in aid of a criminal investigation. The investigation from which these summonses arose has been found to be a criminal investigation, not a tax investigation with possible criminal and civil liability.

The Petitioners' citation to the Court of Section 3654(a) of the 1939 Code is irrelevant. Analogizing that the general powers and duties of the secretary are coextensive with the summons power granted by Congress is clearly misleading. That Section 3654(a) of the 1939 Code provided for the collector to see to the faithful execution of and compliance with the laws and

regulations relating to the collection of taxes did not give unlimited scope to the summons authority of the Service. See *United States* v. *Bisceglia*, *Id.* at 152-161 (dissenting op.).

D. This Court's Decisions in Donaldson v. United States, 400 U. S. 517, and United States v. Powell, 379 U. S. 48, Support the Conclusions of Law Below.

The Court in *Powell* clearly stated the conditions precedent to the enforcement of a summons issued by the Internal Revenue Service. The Court stated that the investigation must be conducted pursuant to a legitimate purpose, that the inquiry be relevant to that purpose, that the information sought is not already within the Commissioner's possession and that the requisite administrative steps had been followed. *Id.* at 57. Nevertheless, the court, in clear recognition of the judicial functions implicit in any summons enforcement procedure, stated that the summons could be challenged on any appropriate ground.

The court's decision in *Donaldson* clearly indicates that when the sole object of an investigation is to obtain evidence for a criminal investigation, the issuance of the summons in furtherance of such is improper. The Court stated:

> The Reisman dictum is to be read in the light of its citation of Boren, and of Boren's own citation of O'Connor; when so read, the dictum comes into proper focus as applicable to the situation of a pending criminal charge or, at most, *of an investigation solely for criminal purposes. Id.* at 533. (Emphasis supplied).

The court concluded its decision in *Donaldson* by stating, "We hold that under Section 7602 an Internal Revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to the recommendation for criminal prosecution." *Id.* at 536. The Government's arguments herein consistently have ignored the good faith requirement of *Donaldson*.

The fact that, at the time Special Agent Olivero had issued the summonses to the Respondents herein, no recommendation

had been made by the Internal Revenue Service to the Department of Justice did not prevent Special Agent Olivero from issuing the summons solely in aid of a criminal investigation. The character of the investigation is not necessarily determined by this recommendation. It is clear that a special agent could delay in making such a recommendation or conduct, as he has herein, a criminal investigation where no recommendation has been made. It is the purpose and the nature of the investigation which determines the legitimacy of a summons issued in furtherance thereof. It is precisely this inquiry which determines the good faith or lack thereof in the issuance of the summons.

The Constitution provides for only one accusatory body and that is the Grand Jury. To allow the secretary or his delegate, the special agent, unlimited and unexamined summons authority to conduct an investigation, the sole purpose of which is to unearth evidence of criminal conduct, is tantamount to creating a Grand Jury with each and every special agent appointed. It is this type of abuse which the good faith requirement of *Donaldson*, if correctly applied, will avoid. As the court stated in *Abel* v. *United States*, 362 U. S. 217,

> The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States. *Id.* at 226.

E. The Summonses Herein Request Information Already Within the Possession of the Internal Revenue Service and Are Unenforceable for That Reason.

The Court in *Powell* articulated those elements which the Commissioner (Secretary) must establish for judicial enforcement of an Internal Revenue Service summons. The Court stated:

> He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, *that the information sought is not already within the Commissioner's possession*, and that the administrative steps required by the Code have been followed—. . . *Id.* at 57-58 (Emphasis added.)

During the cross-examination of Special Agent Olivero in the district court below, the following exchange took place:

> "Q. Have you, on any occasion whatsoever, seen any or all of the documents which are now requested from the LaSalle National Bank?
> A. I can't recall." (App. p. 44.)

At another point in the cross-examination of Special Agent Olivero, the following was asked and answered:

> "Q. Have you checked the land title records?
> A. In our office, yes, sir. The identity of the land—
> THE COURT: The question is what title records did you check. Did you check over the County Building and check the County Land Title Records?
> THE WITNESS: I checked the land records for [35] purposes of identifying the real estate and then I checked the land trust files with the Internal Revenue Service."
>
> *By Mr. Cushner.*
>
> "Q. The Internal Revenue Service maintains land trust files?
> A. They maintain identity of land trust files submitted to them by the banks.
> Q. Do all the banks in the City of Chicago extend to the Internal Revenue Service the benefit of names of beneficiaries of land trusts?
> MR. CONTRAM: I object, your Honor.
> THE COURT: Objection sustained.
> Did you find anything in your search of the IRS land trust files relative to this case?
> THE WITNESS: Yes, sir. I found the name and identity of the land trust.
>
> *By Mr. Cushner.*
>
> Q. How was that provided to the Internal Revenue Service?
> A. I assume by the bank.

MR. CUSHNER: Your Honor, I'd like to go into how exactly the IRS received these records.

These records, under Illinois law, are confidential. Land trust documents provided that they should not be [36] disclosed and I think we should have a right to inquire how the IRS, if this agent knows, how the IRS acquired these records.

THE COURT: Tell me first how it's relevant?

MR. CUSHNER: I think it's possible that these agents may have obtained this information from friendly officers of the bank and the summons would be invalid and not be enforced by the Court if this is true.

THE COURT: I don't agree with that. Seeing something under any circumstances is far different from a summons requiring its production and official disclosure. I don't think that's even an appropriate area of inquiry.

MR. CUSHNER: I think Powell v. United States, the Supreme Court case, has established the fact that if the information is already within the hands of the Internal Revenue Service it's not proper inquiry for the summons. Okay, I'll go on." (App. pp. 45-46.)

The laws of the State of Illinois provide specifically for the creation of an Illinois land trust. Ill. Rev. Stat. Ch. 29, Section 8.31 (1971). The law generally provides that a trustee, in the instant case the LaSalle National Bank, pursuant to an Illinois land trust, becomes the bare holder of the legal and equitable title to real estate. The interest of the beneficiary consists of each and every element of ownership relating to real property, other than holding legal and equitable title thereto. The beneficiary, upon written direction, may cause title to be transferred; he is entitled absolutely to the avails and profits of the property, if any; is charged with the management and control of the premises, and is ultimately liable for any and all tort liability.

Land trust records consist of no more than the contract of trust between the beneficiary and the trustee providing that the trustee shall hold bare legal and equitable title to the property.

Land trust records also may contain whatever powers of direction may have been directed to the trustee, as well as whatever documents may be related to the purchase or sale of the property, as title is taken by or given by the land trust.

It is clear that Special Agent Olivero has seen or had access to some or all of these documents. The land trust documents themselves appear to be available to the Internal Revenue Service in their files. Information already has been provided to the Internal Revenue Service and hence to Special Agent Olivero by Revenue Agent Lieberman (App. pp. 39-40). Other information already is in the possession of the Internal Revenue Service through the return of the taxpayer herein and through the public records maintained by the County of Cook, State of Illinois.

It is clear that a full examination of Special Agent Olivero was prevented by the District Court below. (App. p. 46) Nevertheless, in view of the judicial recognition of the prevarication of Special Agent Olivero, it is questionable whether such examination would have elicited a full and complete disclosure of what information already was within the Secretary's possession.

CONCLUSION.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

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No. 77-365

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

LASALLE NATIONAL BANK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondents' entire argument rests upon the erroneous assumption of the courts below that the special agent's investigatory activities were "solely for criminal purposes" so that his issuance of a summons to obtain evidence of criminal tax violations did not meet the "good faith" standard of this Court's decision in *Donaldson* v. *United States*, 400 U.S. 517. In respondents' view (Br. 4), the summonses in this case "were issued solely in aid of a criminal investigation and not for any of the purposes enumerated in Section 7602 of the Internal Revenue Code."

But as the Court correctly recognized in *Donaldson*, a special agent does not conduct a criminal tax investigation in a vacuum without regard to the taxpayer's correct tax liability. Here, as in the vast majority of cases, the taxpayer's correct tax liability is the essential focal point of

the investigation. If there is a significant discrepancy between the taxpayer's reported and actual tax liability, the special agent will then turn his inquiry to evidence of willfulness and other indicia of criminal conduct—evidence that would indicate liability for fraud penalties. As Judge Friendly recently observed for the court of appeals in *United States* v. *Morgan Guaranty Trust Co.*, C.A. 2, No. 77-6191, decided February 6, 1978,[1] in terms that are equally appropriate to this case, "[w]e start from the premise that investigations of taxpayers that would develop evidence of criminal but not of civil tax liability must be rare; indeed, petitioners have pointed to none" App., *infra*, p. 12a).[2]

Here, there can be no doubt that Special Agent Olivero issued the summonses to respondents for the purpose of determining the taxpayer's correct tax liability. In response to the question why he decided to obtain testimony and documents from LaSalle National Bank, agent Olivero stated: "The income tax returns of the taxpayer disclosed rental income from real property. Then it was necessary to go to LaSalle Bank, who has custody of the trust files[,] to obtain those documents to determine the accuracy of the items reported" (A. 27). This

[1]For the convenience of the Court, we have set forth the Second Circuit's opinion in *Morgan Guaranty Trust Co.* in the Appendix, *infra*, pp. 1a-15a.

[2]At one point in the proceeding, respondents expressed agreement with our submission, as endorsed by Judge Friendly, that the civil and criminal elements of tax investigations are necessarily intertwined. In response to the district court's observations that the agent's notes might indicate that "it was a civil investigation until he closed it" and that "[i]f that's the law, you're in trouble Mr. Cushner," counsel for respondents replied as follows: "I agree with you. I think though that your Honor hit the nail on the head. It would be impossible to have a criminal indictment come out with respect to an income tax violation if there wasn't a penalty or tax due" (A. 62).

explanation reinforces the agent's prior testimony that the purpose of the investigation was "[t]o determine the tax liabilities for the years under investigation" (A. 26). In these circumstances, there is no basis for respondents' argument that the summonses were not issued for any of the purposes set forth in Section 7602. To the contrary, the agent's testimony established that the summonses were "[f]or the purpose of ascertaining the correctness of * * * [the] return[s], * * * determining the liability of * * * [the taxpayer] for * * * internal revenue tax * * *, or collecting any such liability * * *" (26 U.S.C. 7602).

2. To be sure, the focus of the work of a special agent of the Intelligence Division[3] is on possible criminal violations, so that he is only assigned to a case " 'as a result of some allegation or indication of criminal conduct.' " *Donaldson* v. *United States, supra,* 400 U.S. at 537 n. 1 (Douglas, J., concurring). See also *Beckwith* v. *United States,* 425 U.S. 341, 345. But there is necessarily a close connection between the civil and criminal aspects of a tax investigation, and "[t]here is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance." *Donaldson* v. *United States, supra,* 400 U.S. at 535. See also *id.* at 537 (Douglas, J., concurring); *Couch* v. *United States,* 409 U.S. 322, 326. If there is

[3]On February 6, 1978, the Internal Revenue Service announced that the Audit and Intelligence Divisions would be redesignated as the Examinations and Criminal Enforcement Divisions, respectively. See I.R.S. News Release, February 6, 1978. No change in the responsibilities of these two Divisions accompanied these changes in name.

evidence warranting a criminal prosecution, the same evidence is also likely to result in, or support, a deficiency assessment and a civil fraud penalty.[4]

It is this close relationship between the civil and criminal aspects of a tax investigation that is the basis of the Court's holding in *Donaldson* that "under §7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution" (400 U.S. at 536). The distinction that the Court drew was not between civil and criminal tax investigations but between a summons issued before the Internal Revenue Service recommends criminal prosecution to the Department of Justice and a summons issued after such a recommendation. It is only in the latter situation that the summons is unenforceable because at that point the summons would aid the Department of Justice in carrying out its prosecutorial functions.[5]

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[4]The Intelligence (now Criminal Enforcement) Division is also responsible for recommending whether the 50 percent civil fraud penalty should be asserted under Section 6653(b) of the Code. See Section 601.107(a), Treasury Regulations on General Procedural Rules (26 C.F.R.). Thus, when a case is referred to that Division, the special agent's investigation involves not only whether the Service should recommend criminal prosecution but also whether it should impose the civil fraud penalty.

[5]But cf. *United States* v. *Genser and Forman*, C.A. 3, Nos. 76-2623 and 76-2624, decided February 23, 1978. There, the court held that the defendants in a criminal tax case had standing to seek to suppress evidence summoned by the Internal Revenue Service from third parties. Although the summonses were issued prior to the recommendation for criminal prosecution, the court remanded the case to the district court to conduct a hearing as to "when, if at all, the focus of the IRS investigation became solely criminal in nature, [and] what evidence was secured by administrative summonses after that point in time * * *" (slip op. 34). This disposition was consistent with prior Third Circuit decisions cited in our opening brief at pp. 35-36, n. 13.

Respondents, however, assert (Br. 9) that "[s]uch a characterization is simplistic and ignores the very standard of good faith enunciated by the Court in *Donaldson*." But the requirement that a summons be issued in "good faith" is not breached by the fact that the focus of the agent's investigation is on uncovering evidence of criminal conduct. As the Court pointed out in *United States* v. *Powell*, 379 U.S. 48, 58, a court may not permit its process to be abused in enforcing a summons. In outlining examples of "abuse," the Court stated that "[s]uch an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation" (*ibid.*). These examples of abuse do not even remotely suggest that a special agent's quest for evidence of criminal conduct would not be "good faith."

In sum, apart from the instances of abuse outlined in *Powell*, *Donaldson* establishes the objective test that a third party internal revenue summons may be used in aid of a criminal investigation as long as it is issued "prior to a recommendation for criminal prosecution" (400 U.S. at 536). This objective test avoids the necessity of determining the thought processes of special agents in order to appraise the relative weight of the civil and the criminal aspects of the investigation. If there is no evidence of any of the examples of abuse mentioned in *Powell* and the summons is issued before the Internal Revenue Service recommends prosecution to the Department of Justice,

the teaching of *Donaldson* is that the summons is enforceable. As Judge Friendly's opinion for the court concluded in *United States* v. *Morgan Guaranty Trust Co.*, *supra* (App., *infra*, p. 12a):

> This seems to us to be the thrust of the [*Donaldson*] opinion when it is read as a whole, particularly the discussion of the broad availability of the summons for criminal investigations, 400 U.S. at 535-36. Such a view would also be consistent with the only rationale that has ever been offered for preventing an otherwise legitimate use of an Internal Revenue Service third party summons, namely that Congress could not have intended the statute to trench on the power of the grand jury or to broaden the Government's right to discovery in a criminal case, see *United States* v. *O'Connor, supra*, 118 F. Supp. [248] at 250-51 [D. Mass.]. Such considerations are scarcely applicable when no responsible government official has yet made any determination with respect to the propriety of a prosecution.

3. Finally, respondents contend (Br. 16-19) that the summonses at issue should not be enforced because the information sought by the agent was "already within the Commissioner's possession * * *" (*United States* v. *Powell*, *supra*, 379 U.S. at 58). The courts below never reached the question whether the information sought by the summonses was already within the Service's possession. Since the question is basically factual, was not ruled upon by the lower courts, and is not encompassed in the question upon which the Court granted certiorari, there is no reason for this Court to consider it in the first instance.

At all events, respondents' argument is without merit. A careful reading of the cited testimony (Br. 17-18; A. 45-46) shows that prior to the issuance of the summonses the agent had access only to the land trust records that

identified the taxpayer under investigation as the beneficial owner of certain real estate. However, because "[t]he income tax returns of the taxpayer disclosed rental income from real property," the agent concluded that "it was necessary to go to LaSalle Bank, who has custody of the trust files[,] to obtain those documents to determine the accuracy of the items reported" (A. 27). It is therefore plain that the information sought by the summonses was not already within the Commissioner's possession.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

DOJ-1978-03

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 622—September Term, 1977.

(Argued January 11, 1978 Decided February 6, 1978.)

Docket No. 77-6191

UNITED STATES OF AMERICA,

Petitioner-Appellee,

v.

MORGAN GUARANTY TRUST COMPANY,

Respondent,

and

ROGER L. KEECH and SANDRA J. KEECH,

Intervenors-Appellants.

Before:

FRIENDLY and VAN GRAAFEILAND, *Circuit Judges,* and DOOLING, *Senior District Judge.**

Appeal by taxpayers-intervenors from an order of the District Court for the Southern District of New York, Robert L. Carter, *Judge,* granting enforcement of a summons issued under I.R.C. § 7602 to Morgan Guaranty Trust Company to produce described bank records relating to intervenors.

Affirmed.

* Of the United States District Court for the Eastern District of New York, sitting by designation.

LOUIS BENDER, Esq., New York, N.Y. (Sandor Frankel, Esq., and Bender & Frankel, Esqs., New York, N.Y., of Counsel), *for Intervenors-Appellants.*

GAINES GWATHMEY, III, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and William G. Ballaine, Assistant United States Attorney, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge:*

The United States filed a petition in the District Court for the Southern District of New York under I.R.C. §§ 7402 (b) and 7604(a), to enforce a summons issued under the authority of the Secretary of the Treasury pursuant to I.R.C. § 7602.[1] The petition was supported by an affidavit

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1 This provides:

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

of I.R.S. Special Agent Alexander Dombroski, who had issued the summons. The summons had directed Morgan Guaranty Trust Company

> to appear before Special Agent A. Dombroski, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers and other data:
>
> Signature card, ledger sheets, or transcripts of accounts for any and all savings, or checking accounts and Certificates of Deposits in the names of Roger L. and/or Sandra J. Keech covering the period 1972 through 1975. Also, any records, to include application and record of repayments relating to loans, mortgages and letters of credit.

Mr. and Mrs. Keech (the taxpayers) were notified of the issuance of the summons and directed the bank not to comply. Exercising the right given them by I.R.C. § 7609 (b), added by the Tax Reform Act of 1976, they intervened and stayed compliance with the summons.[2]

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(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Aug. 16, 1954, c. 736, 68A Stat. 901; Oct. 4, 1976, Pub. L. 94—455, Title XIX, § 1906(b) (13) (A), 90 Stat. 1834.

2 The quid pro quo for this newly accorded statutory right is § 7609(e). This provides:

(e) Suspension of statute of limitations.—If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection

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Taxpayers submitted an opposing affidavit of counsel, alleging that the summons was not issued "in good faith, in that said summons was issued solely in aid of a criminal investigation of the taxpayers." The contended that such a summons is "improper, unauthorized and unenforceable."

This claim is rested on three factual bases:

> (1) The summons was issued by a Special Agent assigned to the Intelligence Division of the IRS, the function of which is the enforcement of criminal statutes relating to taxes; the Special Agent had issued eleven other summonses during the course of his investigation.
>
> (2) The Special Agent had allegedly stated that he was conducting a "criminal investigation of Roger Keech."
>
> (3) The summons stated that the investigation related to the four-year period 1972-75 but the taxpayers had been previously audited for 1972 and 1974 and these audits had been completed with a determination of no additional tax due.

For proof of the statement mentioned in (2), taxpayers relied on an affidavit of William G. Woolridge, a tax accountant in the employ of Chromalloy American Corporation (Chromalloy). Woolridge stated that on August 15, 1971, he had been present at the office of Arrow Group Industries, Inc. (Arrow), a Chromalloy subsidiary of which Roger Keech was president, and met with IRS agents including Special Agent Dombroski, who were conducting

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of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

an audit of Arrow. As Dombroski left the Arrow premises with Arrow records he had previously requested in connection with his investigation of Keech, an unnamed Arrow employee asked whether production of the records cleared up everything as between Dombrowski and Arrow. Allegedly Dombroski "responded in the affirmative and further stated, in substance, that his only remaining interest was in his criminal investigation of Roger Keech." Taxpayers asked that the Government's enforcement petition should be dismissed or, in the alternative, that an evidentiary hearing be held to determine whether the summons was issued solely in aid of a criminal investigation, with discovery to precede this.

The Government countered with a supplemental affidavit of Dombroski and an affidavit of Charles Lazarus, an IRS agent in the Audit Division, which handles civil enforcement. Dombroski stated that in February, 1977, he had been assigned to the investigation of the 1973, 1974 and 1975 returns of the taxpayers jointly with the Audit Division; that the investigation had not yet progressed sufficiently to warrant a decision whether or not to recommend criminal prosecution; and that if he determined not to recommend this, the Audit Division would decide whether there were liabilities for additional taxes and civil fraud penalties. He admitted he had told an Arrow employee, Theodore Beindorf, that he regarded Arrow as having satisfied the summons issued to it but that his investigation of Mr. Keech was ongoing. He denied having used the word "criminal" although conceding that "in point of fact the joint investigation is criminal as well as civil in nature." With respect to the third point in counsel's affidavit, he noted that he was only investigating the Keech's 1973, 1974 and 1975 returns,[3] and that, in accordance with I.R.C.

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3 The Government has disclaimed any request for enforcement of the summons in regard to the tax year 1972.

§ 7605(b), the IRS had notified taxpayers that further information made it necessary to reexamine their books and records for 1974. He thus failed to understand the relevance of counsel's reference to the previous audit. Lazarus affirmed the Audit Division's participation in the joint investigation. He then stated that he was familiar with the file and that it contained

> a) no determination of whether there exists unreported income attributable to the taxpayer for the years in question; b) no determination to recommend criminal prosecution of either Sandra J. Keech or Roger L. Keech and c) no determination of whether grounds exist to institute a civil action seeking to recover additional taxes and/or fraud penalties under the Internal Revenue Code.

and that

> The bank records sought by the IRS summons issued to respondent may be necessary to determine all these issues.

His affidavit concluded with a paragraph which we quote in the margin.[4]

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4 Given the present status of the joint investigation, there are two potential future dispositions. First, Special Agent Dombroski could decide to recommend prosecution, in which event my function would be to submit a Revenue Agent's Report stating the Audit Division's computation of any taxes due. This report would end my involvement in the matter at least until disposition of the criminal aspect of the investigation. Second, Special Agent Dombroski could determine that the facts disclosed by the joint investigation did not warrant the recommendation of a criminal prosecution, in which event he would issue a Discontinued Investigation Report. After the issuance of such a report, the matter would be returned to the Audit Division and to me for a determination of whether to recommend an assessment for additional taxes and/or seek civil fraud penalties. To reiterate, Special Agent Dombroski has informed me that the joint investigation has not developed sufficiently to warrant a decision by him on either of the options discussed in this paragraph.

The taxpayers submitted no further affidavits. After hearing argument Judge Carter granted the Government's petition and taxpayers appealed. Meanwhile enforcement has been stayed.

Discussion

The question how far a summons issued under I.R.C. § 7602 is open to attack because of its relation to a criminal prosecution has been much litigated in recent years. Since we hopefully will receive further enlightenment on the subject as a result of the grant of certiorari, 46 U.S.L.W. 3384 (Dec. 13, 1977), to review *United States* v. *LaSalle National Bank*, 554 F.2d 302 (7 Cir. 1977), a summary of the doctrinal history will suffice.

There is nothing on the face of the statute, see note 1 *supra*, which prevents its utilization in aid of an investigation with a potential for criminal rather than merely civil prosecution of a taxpayer. Indeed, in its latest decision on the subject, the Supreme Court seems to us to have so declared, *Donaldson* v. *United States*, 400 U.S. 517, 535 (1971). Current dubieties have their origin in a dictum in *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964), where, in upholding the denial of injunctive and declaratory relief to a taxpayer's attorneys in a suit against the Commissioner of Internal Revenue and an accounting firm with respect to reports produced by the latter at the attorneys' request for use in civil and criminal litigation against the taxpayer, the Court said:

> Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on

> any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren* v. *Tucker*, 239 F.2d 767, 772-773, as well as that it is protected by the attorney-client privilege, *Sale* v. *United States*, 228 F.2d 682.

If *Boren* v. *Tucker* constituted the limit of what the Court had in mind, the restriction placed on I.R.C. § 7602 would not be very great. There the court of appeals, after having propounded the question whether use of the word "correctness" in § 7602 would "prevent examination [of a taxpayer's records] for purpose[s] of securing evidence for a criminal prosecution?", answered in the negative. Referring to what the court characterized as the taxpayer's "only authority on this aspect of his position," *United States* v. *O'Connor*, 118 F. Supp. 248, 250 (D. Mass. 1953), the opinion correctly characterized Judge Wyzanski's opinion in that case as holding only that the predecessor to § 7602 "did not authorize an agent to issue a subpoena, merely to aid the prosecution of a *pending* criminal action by the Department of Justice." *Boren* v. *Tucker*, *supra*, 239 F.2d at 772 (emphasis in original).[5]

The argument for a restrictive reading of § 7602 was not advanced by *United States* v. *Powell*, 379 U.S. 48, 58 (1964). Although Mr. Justice Harlan declared that a court may not permit its process in enforcing a summons to be abused, his examples of "abuse" were:

> Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.

5 The court of appeals listed five factors which were present in *O'Connor* but were absent both in *Boren* and here, 239 F.2d at 772.

Nothing was said to indicate that an intention by the Commissioner to uncover criminal tax liability would reflect "on the good faith" of the inquiry, and the rule of *ejusdem generis* would dictate the contrary.

This was the background against which the Court decided *Donaldson* v. *United States*, *supra*, 400 U.S. 517, 532-36, a case which like this involved the enforcement of a third party summons issued by a Special Agent. The Court referred to the dictum in *Reisman* v. *Caplin*; to subsequent decisions of courts of appeals approving "the use of a summons in an investigation that is likely to lead to civil liability as well as to criminal prosecution" or "even where it is alleged that its purpose is to uncover crime, if no criminal prosecution as yet has been instituted"; and to other decisions holding that "where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution, the purpose is not a legitimate one and enforcement may be denied." After giving as an instance of this "the case where a criminal prosecution has been instituted and is pending at the time of issuance of the summons," the Court said, 400 U.S. at 533:

> It is precisely the latter situation—where the sole object of the investigation is to gather data for criminal prosecution—that is the subject of the *Reisman* dictum. This is evident from the fact that the dictum itself embraces the citation of *Boren* v. *Tucker*, 239 F. 2d 767, 772-773 (CA9 1956), an opinion in which, at the pages cited, the Ninth Circuit very carefully distinguished *United States* v. *O'Connor*, 118 F. Supp. 248 (Mass. 1953), a case where the taxpayer already was under indictment. The *Reisman* dictum is to be read in the

> light of its citation of *Boren*, and of *Boren's* own citation of *O'Connor*; when so read, the dictum comes into proper focus as applicable to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes.

The Court then went on to point out that Donaldson was not under indictment; that no recommendation had been made for his prosecution; that whether he ever would be prosecuted would depend on the result of the audit; and that, as noted above, there is nothing in § 7602 restricting "use of the summons for investigation into criminal conduct."[6] The opinion concluded, 400 U.S. at 536:

> We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

Other courts of appeals have subjected the *Donaldson* opinion to lengthy textual exegesis reminiscent of scholastic philosophers or Talmudists. The results are summarized in Judge Pell's opinion for the Seventh Circuit in the *LaSalle National Bank* case, *supra*, 554 F.2d at 302, now before the Court on certiorari. In particular the two passages quoted have been thought to be in contradiction, or at least

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6 The Court also stated:

> Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct . . . . There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law.

400 U.S. at 535-36 (citations omitted).

to be so unless the words "issued in good faith" in what the Court characterized as its holding are read to encompass investigations for the sole purpose of finding a basis for criminal prosecution rather than what Mr. Justice Harlan seems to have meant when he used those words in *Powell*. Courts taking this view have held that a warrant issued in an investigation "solely for criminal purposes" is not "issued in good faith" and "is impermissible . . . even though there has been no recommendation for prosecution." *United States* v. *Zack*, 521 F.2d 1366, 1368 (9 Cir. 1975). See, e.g., *United States* v. *LaSalle National Bank*, *supra*, 554 F.2d at 308-09. The Government, by contrast, argues that a summons is valid as long as criminal prosecution has not been recommended by the IRS to the Department of Justice. Br. at 10.[7]

If there were not good grounds for hope that the Supreme Court itself will soon clear away the underbrush, we would be inclined to reconcile the disparity between the quoted passages, if such there be,[8] on the basis that the stated holding, rather than the passage on p. 533, was the real holding; that, so far as concerned use of a third party sum-

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7 The issue has not been decided in this circuit. In *United States* v. *Asphalt Materials, Inc.*, 77-1 U.S.T.C. 86,189 (W.D.N.Y. 1976), *aff'd by order*, 77-1 U.S.T.C. ¶7,140 (2 Cir. 1977), *cert. denied*, 46 U.S.L.W. 3262 (1977), the district court apparently adopted the "sole purpose" test advanced by the taxpayers here, and in particular the "already formed a firm purpose to recommend prosecution" variant. However, the district court also found that the taxpayers had not shown that the sole purpose of the summons was for a criminal investigation and the appeal was by the taxpayer from that finding. See also Second Circuit Rules § 0.23.

8 The disparity would disappear if the passage on p. 533 is read as characterizing the holdings of the courts of appeals rather than as approving all of them, particularly the "sole purpose" cases. The Court had preceded its reference to the latter cases by the cautionary phrase "it has been said." Also in view of the use of the phrase "at most," the Court can hardly have meant to give unqualified approval to the *Reisman* dictum.

mons for criminal investigations, the Court was laying down an objective test, "prior to recommendation for criminal prosecution," that would avoid a need for determining the thought processes of special agents; and that the "good faith" requirement of the holding related to such wholly different matters as those mentioned in *Powell*. This seems to us to be the thrust of the opinion when it is read as a whole, particularly the discussion of the broad availability of the summons for criminal investigations, 400 U.S. at 535-36. Such a view would also be consistent with the only rationale that has ever been offered for preventing an otherwise legitimate use of an Internal Revenue Service third party summons, namely that Congress could not have intended the statute to trench on the power of the grand jury or to broaden the Government's right to discovery in a criminal case, see *United States* v. *O'Connor*, *supra*, 118 F. Supp. at 250-51. Such considerations are scarcely applicable when no responsible government official has yet made any determination with respect to the propriety of a prosecution.

However, so far as this case is concerned, we find no necessity for making such a decision for the period until the Court speaks again. Even if we were to subscribe to the reading given *Donaldson* by *LaSalle National Bank* and other cases, petitioners made no showing sufficient to call for an evidentiary hearing or discovery on whether the summons was to be used solely to develop evidence for prosecution.

We start from the premise that investigations of taxpayers that would develop evidence of criminal but not of civil tax liability must be rare; indeed, petitioners have pointed to none. To be sure, a taxpayer can violate I.R.C. § 7206(1) or the misdemeanor section, § 7207, by making a wilfully false statement even though no further tax is due. See *United States* v. *Tsanas*, decided Jan. 13, 1978. slip

opinions 1077, 1080-82. *Prima facie*, however, when the Audit Division and the Intelligence Division cooperate in an investigation, their interest is in establishng a deficiency which may be the basis for a civil recovery, with or without fraud penalties, a criminal prosecution, or both. Both Special Agent Dombroski and Agent Lazarus swore that this was the case here. Thus, the involvement of the Special Agent in the investigation (as was also the case in *Donaldson*) in no way detracts from the conclusion that the investigation served both criminal and civil purposes. All that was brought up against this was Woolridge's affidavit that the Special Agent had said to an Arrow employee, unnamed by him but named by Dombroski, that, after getting the additional records from Arrow "his [Dombroski's] only remaining interest was in his criminal investigation of Roger Keech." Even assuming that Dombroski had in fact said this, which he denied, it would prove nothing that would justify rejection of the Government's petition. While under IRS procedures Dombroski's own interest was in determining whether he should recommend a prosecution, neither the making of such a recommendation nor the failure to make one would lessen the IRS' appropriate interest in determining whether the taxpayers were liable for deficiencies and penalties. Finally, we find Dombroski's answer to the taxpayers' third argument more than sufficient. The IRS is interested in only one year for which the Keeches have been previously audited, and as to that year the taxpayers, pursuant to statute, have been advised of the Service's need to reexamine their records to redetermine their tax liability. The mere need to reexamine previously audited books provides no evidence that solely criminal prosecution is intended. Even under the broadest reading of *Donaldson* as to the meaning of the phrase "issued in good faith," a taxpayer must show something

more than was done here in order to be entitled to discovery[9] and an evidentiary hearing.

9 Citing *Powell, supra*, 379 U.S. at 58, n.18, and F.R.C.P. 81(a)(3), the taxpayers note that the Federal Rules of Civil Procedure apply to IRS summons enforcement proceedings. They therefore conclude that "at some stage prior to the District Court's ruling . . . discovery should . . . have been allowed," and cite a number of cases in which courts have ordered various degrees of discovery. E.g., *United States* v. *Roundtree*, 420 F.2d 845 (5 Cir. 1970) (deposition of IRS agent); *United States* v. *McCarthy*, 514 F.2d 368 (3 Cir. 1976) (evidentiary hearing to determine whether a summons was issued in good faith); *United States* v. *Wright Motor Co.*, 536 F.2d 1090 (5 Cir. 1976) (limited deposition of Special Agent).

However, F.R.C.P. 81(a)(3) contains the caveat: "except as otherwise provided by . . . rules of the district court or by order of the court in the proceedings." The 1946 Report of the Advisory Committee on Rules of Civil Procedure, commenting on F.R.C.P. 81(a)(3), stated:

> The provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired . . . . [I]t is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful.

3 Legislative History of Rules of Civil Procedure 161 (1947 Amendments). The decision of the district court to deny discovery in this case constitutes an exercise of discretion which even the taxpayers' cases recognize should not be reversed unless discretion was abused. See *United States* v. *Wright Motors Co.*, 536 F.2d at 1093-94. The Supreme Court also recognized in *Donaldson, supra*, 400 U.S. at 528-29, that an application of the Rules which would destroy the summary nature of enforcement proceedings is not required. The specific discovery sought by the Keechs illustrates the drastic impact on IRS's investigations that the granting of such requests would create. Taxpayers asked that the court "order the IRS agents involved in this investigation to appear for depositions by the taxpayers' counsel prior to the hearing, with all books, records reports, memoranda, and other documents relative to the issue of the purpose for the issuance of the summons and the nature of the investigation of the taxpayers." Intervenors' Memorandum of Law at 13. Such discovery would seriously delay not only criminal but civil investigation. See *United States* v. *Salter*, 432 F.2d 697, 700 (1 Cir. 1970). When these policy considerations are coupled with the Supreme Court's statement in *Powell*, 397 U.S. at 58, repeated in *Donaldson*, 400 U.S. at 527, that "the burden of showing an abuse of the Court's process is on the taxpayer," it is thus clear that the taxpayer must make a substantial preliminary showing before even limited discovery need be ordered. Compare *United States* v. *Newman*, 441 F.2d 165, 169 (5 Cir. 1971) (". . . the summoned party must raise in a substantial way the existence of substantial deficiencies in the summons proceedings. Only when so raised is there any need for an evidentiary hearing or—in anticipation of it—the traditional discovery mechanisms . . . with appropriate limitations."), with *United States* v. *Wright Motors, supra*, 536 F.2d at 1094.

The order of the district court is affirmed. The stay of enforcement of the summons is extended for fourteen days from the filing of this opinion and if, within that period, an application for a further stay pending a petition for certiorari is filed with the Supreme Court, until such application is determined.